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No. 05-1629
Title: Alberto R. Gonzales, Attorney General, Petitioner
v.
Luis Alexander Duenas-Alvarez
Docketed: June 23, 2006
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (04-74471)
Decision Date: April 18, 2006
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Jun 22 2006	Petition for a writ of certiorari filed. (Response due July 24, 2006)
Jul 12 2006	Order extending time to file response to petition to and including August 23, 2006.
Aug 23 2006	Brief of respondent Luis Alexander Duenas-Alvarez in opposition filed.
Sep 6 2006	DISTRIBUTED for Conference of September 25, 2006.
Sep 6 2006	Reply of petitioner Alberto R. Gonzales, Attorney General filed. (Distributed)
Sep 26 2006	Petition GRANTED.
Sep 26 2006	The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, October 26, 2006. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, November 20, 2006. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, November 27, 2006.
Sep 29 2006	SET FOR ARGUMENT ON Tuesday, December 5, 2006.
Oct 10 2006	Record received from U.S.C.A for the Ninth Circuit. (1 envelope)
Oct 16 2006	Motion to dispense with printing the joint appendix filed by petitioner the Solicitor General.
Oct 18 2006	Record received from U.S.Department of Justice, Board of Immigration Appeals. (1 envelope).
Oct 26 2006	Brief of petitioner Alberto R. Gonzales, Attorney General filed.
Oct 30 2006	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Oct 30 2006	CIRCULATED.
Nov 20 2006	Brief of respondent Luis Alexander Duenas-Alvarez filed.
Nov 20 2006	Motion for leave to file amicus brief filed by California Public Defenders Association. (Distributed)
Nov 20 2006	Motion for leave to file amici brief filed by Professors of Criminal Law. (Distributed)
Nov 20 2006	Brief amicus curiae of National Immigration Project of the National Lawyers Guild filed. (Distributed)
Nov 27 2006	Reply of petitioner Alberto R. Gonzales, Attorney General filed. (Distributed). TBP
Dec 4 2006	Motion for leave to file amicus brief out of time filed by California Public Defenders Association GRANTED.
Dec 4 2006	Motion for leave to file amici brief out of time filed by Professors of Criminal Law GRANTED.
Dec 5 2006	Argued. For petitioner: Dan Himmelfarb, Assistant to the Solicitor General, Department of Justice, Washington, D.C. For respondent: Christopher J. Meade, New York, N.Y.

Supreme Court, U.S.
FILED
05-1629 JUN 22 2006
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
PETITIONER

v.

LUIS ALEXANDER DUENAS-ALVAREZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a "theft offense," which is an "aggravated felony" under the Immigration and Nationality Act, 8 U.S.C. 1101(a)(43)(G), includes aiding and abetting.

PARTIES TO THE PROCEEDINGS

Petitioner is Alberto R. Gonzales, Attorney General of the United States. Respondent is Luis Alexander Duenas-Alvarez.

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In the Supreme Court of the United States

No.

ALBERTO R. GONZALES, ATTORNEY GENERAL,
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LUIS ALEXANDER DUENAS-ALVAREZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Attorney General of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-2a) is unreported. The decisions of the Board of Immigration Appeals (App., *infra*, 3a) and the immigration judge (App., *infra*, 4a-10a) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 101(a)(43)(G) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(43)(G), defines "aggravated felony" to include "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year."

2. Section 10851(a) of the California Vehicle Code provides, in part, as follows:

> Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense * * * .

Cal. Veh. Code § 10851(a) (West 2000).

STATEMENT

1. Under Section 237(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1227(a) (2000 & Supp. III 2003), several classes of aliens are subject to removal from the United States, including those who have been convicted of certain kinds of offenses after admission, 8 U.S.C. 1227(a)(2). Aggravated felonies comprise one such category of offenses. 8 U.S.C. 1227(a)(2)(A)(iii). The INA includes a long list of offenses that qualify as an aggravated felony, 8 U.S.C. 1101(a)(43) (2000 & Supp. III 2003), one of which is "a theft offense (including receipt of stolen property) * * * for which the term of imprisonment [is] at least one year," 8 U.S.C. 1101(a)(43)(G).

In deciding whether a particular offense constitutes a "theft offense" under the INA, courts apply the same two-step test that this Court established in *Taylor* v. *United States*, 495 U.S. 575, 599-602 (1990), for deciding whether an offense is a "burglary" under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e) (2000 & Supp. III 2003).[1] See, *e.g.*, *Soliman* v. *Gonzales*, 419 F.3d 276, 284 (4th Cir. 2005); *Huerta-Guevara* v. *Ashcroft*, 321 F.3d 883, 886-888 (9th Cir. 2003). Under the first step of the test, courts employ a "categorical" approach, comparing the statute under which the defendant was convicted with the "generic" definition of "theft offense" to determine whether all conduct covered by the statute falls within the generic definition. If it does, the defendant has been convicted of a theft offense. If the statute covers both conduct that falls within the generic definition and conduct that does not, courts move to the second step, where they employ a "modified categorical" approach and review certain documents in the record of the criminal case (such as the charging instrument and judgment) to determine whether the particular offense of which the defendant was convicted satisfies the generic definition.

2. Respondent is a native and citizen of Peru. In 1992, he was convicted in the Superior Court of California of burglary, and, in 1994, he was convicted in the same court of possession of a firearm by a felon. Despite those convictions, respondent became a lawful permanent resident in 1998. App., *infra*, 6a-7a, 14a.

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[1] Under the ACCA, defendants convicted of certain firearms offenses are subject to a mandatory minimum prison term of 15 years if they have three previous convictions for a "serious drug offense" or "violent felony." 18 U.S.C. 924(e)(1) (2000 & Supp. III 2003). The definition of "violent felony" includes "burglary." 18 U.S.C. 924(e)(2)(B)(ii).

In 2002, respondent was charged in the Superior Court of California with unlawful driving or taking of a vehicle, in violation of California Vehicle Code § 10851(a). The information alleged that respondent willfully and unlawfully drove or took a 1992 Honda Accord without the consent of the owner and with the intent to deprive the owner of title to and possession of the vehicle. Respondent pleaded guilty to the charge and was sentenced to three years of imprisonment. App., *infra*, 7a-8a, 11a-13a.

3. In February 2004, the Department of Homeland Security (DHS) initiated removal proceedings against respondent. He was charged with removability under Section 237(a)(2)(A)(i) of the INA, 8 U.S.C. 1227(a)(2)(A)(i), for having been convicted of a crime involving moral turpitude, and under Section 237(a)(2)(A)(iii) of the INA, 8 U.S.C. 1227(a)(2)(A)(iii), for having been convicted of an aggravated felony—in particular, a theft offense for which the term of imprisonment is at least one year, 8 U.S.C. 1101(a)(43)(G). Both charges were based on respondent's 2002 conviction. App., *infra*, 4a-5a, 7a, 9a.

The immigration judge (IJ) ruled that the California offense of unlawful driving or taking of a vehicle was not a crime involving moral turpitude but was a theft offense (and thus an aggravated felony). The IJ accordingly found that respondent was removable from the United States and ordered him removed to Peru. App., *infra*, 9a-10a.

The Board of Immigration Appeals (BIA) dismissed respondent's appeal. App., *infra*, 3a. Adopting the decision of the IJ, the BIA held that "respondent's conviction for auto theft constitutes an aggravated felony." *Ibid.*

4. While respondent's petition for review was pending in the Ninth Circuit, that court decided *Penuliar* v. *Ashcroft*, 395 F.3d 1037 (2005), amended, 435 F.3d 961 (2006). *Penuliar* held that a violation of California Vehicle Code § 10851(a) is not a theft offense as a "categorical" matter. 395 F.3d at 1044-1045. The Ninth Circuit reasoned that the California statute can be violated if the defendant is "a party or an accessory to or an accomplice in" the unauthorized taking of the vehicle and that such conduct does not necessarily entail the taking of property or the exercise of control over property, which the court considered an essential element of the generic definition of "theft offense." *Ibid.* *Penuliar* also held that the Section 10851(a) convictions at issue in that case were not for a theft offense under the "modified categorical" approach. *Id.* at 1045-1046. Although the charges to which Penuliar pleaded guilty described him as a principal, the court deemed that fact insufficient to establish that he had been convicted of a theft offense, because a defendant in California may be convicted as an aider and abettor even when an aiding-and-abetting theory is not recited in the charging instrument. *Ibid.*

The government petitioned for panel rehearing and rehearing en banc in *Penuliar*, arguing that the fact that Section 10851(a) criminalizes aiding and abetting does not preclude categorically treating unlawful driving or taking of a vehicle as an aggravated felony. The Ninth Circuit denied the petition, and issued an amended opinion. *Penuliar* v. *Gonzales*, 435 F.3d 961 (2006). The court held that the government's contention was foreclosed by a decision issued after the initial decision in *Penuliar*, *Martinez-Perez* v. *Gonzales*, 417 F.3d 1022 (9th Cir. 2005), which held that grand theft, in violation of California Penal Code § 487(c) (West 1999), was not a

theft offense under the INA because a defendant can be convicted under an aiding-and-abetting theory. *Penuliar*, 435 F.3d at 970 n.6.

5. After the amended decision in *Penuliar* was issued, the court of appeals granted respondent's petition for review. App., *infra*, 1a-2a. The court explained that the IJ had found that respondent's conviction for unlawful driving or taking of a vehicle "categorically met the definition of a theft offense" and that the court had "recently held" in *Penuliar* that "a violation of section 10851(a) does *not* categorically qualify as a theft offense because that section is broader than the generic definition." *Id.* at 2a (emphasis added). The court therefore "remand[ed] th[e] petition to the [BIA] for further proceedings in light of *Penuliar*." *Ibid.*

REASONS FOR GRANTING THE PETITION

In granting respondent's petition for review, the Ninth Circuit applied its holding in *Penuliar* v. *Gonzales*, 435 F.3d 961 (2006), that aiding and abetting is not encompassed by the generic definition of "theft offense" under Section 101(a)(43)(G) of the INA. That holding is incorrect; it conflicts with decisions of other courts of appeals; if left unreviewed, it will have a substantial effect on the administration of the immigration laws; and this case is the most suitable vehicle for deciding whether it is correct. This Court should therefore grant certiorari to review the Ninth Circuit's decision in this case.

A. The Ninth Circuit's Rule Is Incorrect

As this Court made clear in *Taylor* v. *United States*, 495 U.S. 575 (1990), the "generic" definition of an offense (in that case "burglary," in this case "theft offense") is the "sense in which the term is now used in the

criminal codes of most States." *Id.* at 598; accord *id.* at 589 (generic definition "correspond[s] to the definitions of [the offense] in a majority of the States' criminal codes"). In the criminal codes of *all* States, as well as in the criminal title of the United States Code, the definition of "theft" —and, indeed, of every substantive criminal offense —includes aiding and abetting, because the acts of an aider and abettor are deemed to be the acts of a principal as a matter of law, such that a defendant who aids and abets the commission of a particular offense is guilty of that offense. Aiding and abetting theft is therefore encompassed by the generic definition of "theft offense" in the INA.[2] For that reason, the fact that California Vehicle Code § 10851(a) (West 2000) makes it a crime, not only to engage in an unauthorized taking or stealing of a vehicle, but also to be "a party or an accessory to or an accomplice in the * * * unauthorized taking or stealing," is entirely unremarkable and does not take the offense outside the generic definition.[3]

While at common law "the subject of principals and accessories was riddled with 'intricate' distinctions," *Standefer* v. *United States*, 447 U.S. 10, 15 (1980) (quoting 2 James Fitzjames Stephen, *A History of the Crimi-*

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[2] The generic definition applied by the Ninth Circuit is "a taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." *Penuliar*, 435 F.3d at 969 (citation omitted). Except insofar as it excludes aiding and abetting, we do not challenge that definition in this Court.

[3] In modern criminal codes, there is no meaningful distinction among "party," "accessory," "accomplice," and "aider and abettor." See 2 Wayne R. LaFave, *Substantive Criminal Law* §§ 13.1-13.2 (2d ed. 2003). The Ninth Circuit appears to have used the terms interchangeably. See *Penuliar*, 435 F.3d at 969-970.

nal Law of England 231 (1883)), by the early twentieth century many statutes had "abolishe[d] the distinction between principals and accessories," *Hammer* v. *United States*, 271 U.S. 620, 628 (1926). By the middle of that century, long before the term "aggravated felony" first appeared in Section 101(a) of the INA, see Pub. L. No. 100-690, Tit. VII, § 7342, 102 Stat. 4469-4470 (1988), it was "well engrained in the law" that one who aids or abets the commission of an act "is as responsible for that act as if he committed it directly," *Nye & Nissen* v. *United States*, 336 U.S. 613, 618 (1949) (quoting jury instruction). Indeed, in a different context, the Ninth Circuit has recognized the long-settled principle that "[a]iding and abetting is not a separate and distinct offense from the underlying substantive crime, but is a different theory of liability for the same offense." *United States* v. *Garcia*, 400 F.3d 816, 820, cert. denied, 126 S. Ct. 839 (2005).

Thus, under 18 U.S.C. 2, which was originally enacted nearly a century ago,[4] whoever "aids, abets, counsels, commands, induces or procures" the commission of an offense against the United States, or "willfully causes an act to be done which if directly performed by him or another would be an offense against the United States," is "punishable as a principal." Likewise, the Penal Code of California has abolished "[t]he distinction between an accessory before the fact and a principal," such that "all persons concerned in the commission of a crime, who by the operation of other provisions of this code are principals therein, shall * * * be prosecuted, tried and punished as principals." Cal. Penal Code § 971 (West 1985).

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[4] See Act of Mar. 4, 1909, ch. 321, § 332, 35 Stat. 1152; *Standefer*, 447 U.S. at 18 & n.11.

The term "principals" is elsewhere defined by California statute to include "[a]ll persons concerned in the commission of a crime, * * * whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission." Cal. Penal Code § 31 (West 1999). The statutes of every other State (and the District of Columbia) likewise treat aiders and abettors as principals.[5]

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[5] See Ala. Code § 13A-2-23 (LexisNexis 2005); Alaska Stat. § 11.16.110 (2004); Ariz. Rev. Stat. Ann. § 13-303 (2001); Ark. Code § 5-2-402 (1993); Colo. Rev. Stat. § 18-1-603 (1986); Conn. Gen. Stat. Ann. § 53a-8 (West 2001); Del. Code Ann. tit. 11, § 271 (2001); D.C. Code § 22-1805 (2001); Fla. Stat. Ann. § 777.011 (West 2005); Ga. Code Ann. § 16-2-20 (2003); Haw. Rev. Stat. Ann. § 124A-112 (LexisNexis 2000); Idaho Code Ann. § 19-1430 (2004); 720 Ill. Comp. Stat. Ann. 5/5-2 (West 2002); Ind. Code Ann. § 35-41-2-4 (LexisNexis 2004); Iowa Code Ann. § 703.1 (West 2003); Kan. Stat. Ann. § 21-3205 (1988 & Supp. 1994); Ky. Rev. Stat. Ann. § 502.020 (LexisNexis 1999); La. Rev. Stat. Ann. § 14:24 (1997); Me. Rev. Stat. Ann. tit. 17-A, § 57 (2006); Md. Code Ann., Crim. Proc. § 4-204 (LexisNexis 2001 & Supp. 2005); Mass. Ann. Laws ch. 274, § 2 (LexisNexis 1992); Mich. Comp. Laws Ann. § 767.39 (West 2000); Minn. Stat. Ann. § 609.05 (West 2003); Miss. Code Ann. § 97-1-3 (West 2005); Mo. Ann. Stat. § 562.041 (West 1999); Mont. Code Ann. § 45-2-302 (2004); Neb. Rev. Stat. Ann. § 28-206 (LexisNexis 2003); Nev. Rev. Stat. Ann. § 195.02 (LexisNexis 2001); N.H. Rev. Stat. Ann. § 626:8 (LexisNexis 2001 & Supp. 2005); N.J. Stat. Ann. § 2C:2-6 (West 2005); N.M. Stat. § 30-1-13 (2005); N.Y. Penal Law § 20.00 (McKinney 2004); N.C. Gen. Stat. § 14-5.2 (2005); N.D. Cent. Code § 12.1-03-01 (1997); Ohio Rev. Code Ann. § 2923.03 (LexisNexis 2006); Okla. Stat. Ann. tit. 21, § 172 (West 2002); Or. Rev. Stat. § 161.155 (1987); 18 Pa. Cons. Stat. Ann. § 306 (West 1998); R.I. Gen. Laws § 11-1-3 (1981 & Supp. 1993); S.C. Code. Ann. § 16-1-40 (2003); S.D. Codified Laws § 22-3-3 (1979 & Supp. 1987); Tenn. Code Ann. § 39-11-402 (2003); Tex. Penal Code Ann. § 7.02 (Vernon 2003); Utah Code Ann. § 76-2-202 (2003); Vt. Stat. Ann. tit. 13, § 3 (1998); Va. Code Ann. § 18.2-18 (2004); Wash. Rev. Code Ann. § 9A.08.020 (West 1988); W. Va. Code Ann. § 61-11-6 (LexisNexis 2005);

Despite the modern criminal codes' abolition of the technical distinctions between principal and accessory, the Ninth Circuit has relied on those very distinctions in formulating a narrow, principal-only definition of the generic offense. It has thereby contravened this Court's directive in *Taylor* that the "arcane distinctions embedded in the common[]law" should form no part of the "generic" definition of an offense. 495 U.S. at 593; accord *id.* at 589. The Ninth Circuit's interpretation of the INA is especially implausible because it presumes that Congress intended that a theft offense include aiding and abetting for purposes of the federal criminal laws, see 18 U.S.C. 2, but not for purposes of the federal immigration laws, such that someone convicted of (for example) aiding and abetting the theft of public money, see 18 U.S.C. 641, is subject to the same criminal penalties as a principal but not to the same immigration consequences.[6]

B. The Ninth Circuit's Rule Conflicts With The Rule Applied By Other Courts Of Appeals

In *Penuliar*, the Ninth Circuit held that "aiding and abetting liability is [not] included in the generic definition of a 'theft offense.'" 435 F.3d at 970 n.6. That prin-

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Wis. Stat. Ann. § 939.05 (West 2005); Wyo. Stat. Ann. § 6-1-201 (1996).

[6] As far as we are aware, the BIA has not addressed the question presented in this case in a published decision. While the BIA has held that a violation of California Vehicle Code § 10851(a) is a "theft offense" under Section 101(a)(43)(G) of the INA, *In re V-Z-S-*, 22 I. & N. Dec. 1338 (2000), the decision in that case did not address the theory subsequently adopted by the Ninth Circuit in *Penuliar*. And while the BIA has addressed, and rejected, the argument that aiding and abetting is not included within the definition of "aggravated felony" as a general matter, *In re Malacas*, No. A41 245 089, 2004 WL 2374341 (Sept. 13, 2004), the decision in that case is unpublished and has not been designated as a precedent, see 8 C.F.R 1003.1(g).

ciple is inconsistent with the principle applied by the First, Second, Seventh, and Eighth Circuits in analytically indistinguishable circumstances.

In *United States* v. *Hathaway*, 949 F.2d 609 (1991) (per curiam), cert. denied, 502 U.S. 1119 (1992), the Second Circuit held that the Vermont offense of third-degree arson is categorically an "arson" offense—and thus a "violent felony"—under the ACCA, 18 U.S.C. 924(e), and that the defendant's sentence for unlawful possession of a firearm was therefore properly enhanced. The court rejected the defendant's contention that, because the Vermont statute "prohibits secondary acts such as counseling, aiding or procuring the burning," it criminalizes activity that does not satisfy the generic definition of arson—namely, "a wilful and malicious burning of personal property." 949 F.2d at 610. The Second Circuit reasoned that this Court's decision in *Taylor* requires courts to look to "modern definitions," that "the laws of many states today include counseling, aiding or procuring the burning within the definition of actual arson," and that "[a]iding and abetting also supports a substantive conviction for arson under Federal law." *Id.* at 610-611 (citing 18 U.S.C. 2). The court therefore concluded that aiding and abetting is encompassed within the generic definition of arson. *Ibid.*

In *United States* v. *Groce*, 999 F.2d 1189 (1993), the Seventh Circuit held that the Wisconsin offense of burglary as a party to a crime is categorically a "burglary" offense—and thus a violent felony—under the ACCA, and that the defendant's sentence for unlawful possession of a firearm was therefore properly enhanced. The court rejected the defendant's contention that, because the Wisconsin statute imposes liability for being a "party to a crime," it criminalizes activity that does not

satisfy *Taylor*'s generic definition of burglary as "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Id.* at 1191 (quoting *Taylor*, 495 U.S. at 598). The Seventh Circuit reasoned that "burglary as party to a crime is essentially analogous to aiding and abetting a burglary," and that "both federal law and Wisconsin state law punish an aider and abettor as a principal." *Ibid.* (citing 18 U.S.C. 2). The court therefore concluded that the generic definition of burglary "extends to the context of aiding and abetting," such that "one who aided and abetted the commission of a generic burglary has committed generic burglary." *Id.* at 1192. In so holding, the Seventh Circuit cited the Second Circuit's decision in *Hathaway*, *supra*. *Ibid.*

In *United States* v. *Mitchell*, 23 F.3d 1 (1994) (per curiam), the First Circuit held that the federal offense of aiding and abetting arson is categorically a "crime of violence" under the Bail Reform Act of 1984, 18 U.S.C. 3143(a)(2), and that the defendant was therefore properly detained pending sentencing. The court rejected the defendant's contention that aiding and abetting arson "fall[s] outside the definition of crime of violence" —namely, an offense that "has as an element * * * the use, attempted use or threatened use of physical force against the person or property of another" or that "is a felony and * * * , by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 23 F.3d at 2 & n.1 (quoting 18 U.S.C. 3156(a)(4)). The First Circuit reasoned that "aiding and abetting 'is not a separate offense' from the underlying substantive crime" and that "the *acts* of the principal [are] those of the aider and abetter as a matter of law."

Id. at 2-3 (quoting *United States* v. *Sanchez*, 917 F.2d 607, 611 (1st Cir. 1990), cert. denied, 499 U.S. 977 (1991), and *United States* v. *Simpson*, 979 F.2d 1282, 1285 (8th Cir. 1992), cert. denied, 507 U.S. 943 (1993)). The court therefore concluded that aiding and abetting is encompassed within the definition of crime of violence, such that "aiding and abetting the commission of a crime of violence is a crime of violence itself." *Id.* at 3. In so holding, the First Circuit cited the Second Circuit's decision in *Hathaway*, *supra*, and the Seventh Circuit's decision in *Groce*, *supra*. *Ibid.*

Finally, in *United States* v. *Baca-Valenzuela*, 118 F.3d 1223 (1997), the Eighth Circuit held that the federal offense of aiding and abetting possession of cocaine with the intent to distribute it categorically constitutes "illicit trafficking in a controlled substance"—and thus an aggravated felony—under the INA, 8 U.S.C. 1101(a)(43)(B), and that the defendant's offense level was therefore properly enhanced under Section 2L1.2 of the Sentencing Guidelines, which incorporates the INA's definition of aggravated felony.[7] The court explained its holding as follows:

> A fundamental theory of American criminal law is that there is no offense of aiding and abetting or accomplice liability as such. Instead, accomplice liability is merely a means of determining which persons

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[7] Section 2L1.2 of the Guidelines has since been amended to provide, explicitly, that "[p]rior convictions of offenses counted under subsection (b)(1)"—one of which is an aggravated felony—"include the offenses of aiding and abetting, conspiring, and attempting, to commit such offenses." Sentencing Guidelines § 2L1.2, comment. (n.5). The Ninth Circuit has held that that language renders *Penuliar*'s holding inapplicable to the Guidelines. *United States* v. *Vidal*, 426 F.3d 1011, 1015 (2005).

> were closely enough related to the underlying offense to be prosecuted and convicted of that offense. Whether one is convicted *as* a principal or *as* an accomplice/aider and abettor, the crime of *which* he is guilty is the same: whatever is the underlying offense.

Id. at 1232. In so holding, the Eighth Circuit cited the First Circuit's decision in *Mitchell*, *supra*. *Ibid.*[8]

In those four cases, the statutory offense encompassed aiding and abetting, and the First, Second, Seventh, and Eighth Circuits held that the offense categorically satisfied the generic definition of the crime at issue. If those courts had instead concluded that the possibility of aiding-and-abetting liability meant that the offense did *not* categorically satisfy the generic definition, as the Ninth Circuit held in *Penuliar*, the cases would have been decided differently.[9] Certiorari should be granted to ensure that similar cases are not decided

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[8] This Court recently granted certiorari in *Lopez* v. *Gonzales*, No. 05-547 (Apr. 3, 2006). to decide whether a drug crime that is a felony under state law but a misdemeanor under federal law constitutes illicit trafficking in a controlled substance, and thus an aggravated felony, under the INA, 8 U.S.C. 1101(a)(43)(B). The offense at issue in that case, which was held to be an aggravated felony by the Eighth Circuit, was aiding and abetting the possession of cocaine. See *Lopez* v. *Gonzales*, 417 F.3d 934, 935 (2005).

[9] Like "theft offense" and "illicit trafficking in a controlled substance," "burglary offense" and "crime of violence" are explicitly included within the INA's definition of aggravated felony. 8 U.S.C. 1101(a)(43)(F) and (G). Arson, too, is ordinarily a crime of violence, and thus ordinarily an aggravated felony. *E.g.*, *In re Palacios-Pinera*, 22 I. & N. Dec. 434 (BIA 1998).

differently based on the circuit in which the case arises.[10]

C. If Left Unreviewed, The Ninth Circuit's Rule Will Have A Substantial Effect On The Administration Of The Immigration Laws

1. We are informed by the Department of Homeland Security that there are approximately 8000 aliens who have either been charged with removability or been ordered removed in the Ninth Circuit on the basis of a conviction for a "theft offense." Because *Penuliar* holds that a defendant who can be convicted under a theft statute for aiding and abetting has not been convicted of a "theft offense" as a categorical matter, 435 F.3d at

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[10] In addition to four courts outside the Ninth Circuit, four judges within the Ninth Circuit have expressed their disagreement with the principle applied in *Penuliar*. One of the cases on which *Penuliar* relied (435 F.3d at 969) was *United States* v. *Corona-Sanchez*, 291 F.3d 1201 (2002), where the Ninth Circuit held, en banc, that the California offense of general theft, in violation of California Penal Code § 484(a) (West 1999 & Supp. 2006), was not a theft offense. The court noted in *Corona-Sanchez* that a defendant could be convicted of that offense under an aiding-and-abetting theory. 291 F.3d at 1207-1208. In a dissenting opinion joined by Judges Kozinski, T.G. Nelson, and Kleinfeld, Judge Rymer rejected the court's reasoning:

> It cannot be that the possibility of being liable as an aider or abettor takes an offense out of the running, for this is true of any crime in California, where principals include those who aid or abet the commission of a crime. Cal. Penal Code § 31. In any event, "[t]o be liable as an aider and abettor, the defendant must have instigated or advised the commission of the offense or have been present for the purpose of assisting." 1 Witkin & Epstein, *California Criminal Law* (3d ed)., § 78, p. 124 (2000). This is unremarkable, and well within the bounds of whichever generic formulation is adopted.

291 F.3d at 1216.

969-970, and because defendants in every jurisdiction can be convicted under a theft statute for aiding and abetting, the government's ability to remove those 8000 aliens has been called into serious doubt.[11] The Ninth Circuit has already granted petitions for review on the basis of *Penuliar* in a number of cases (in addition to this one), see *Tabrilla* v. *Gonzales*, No. 04-75440, 2006 WL 679907 (Mar. 15, 2006); *Oliva-Osuna* v. *Gonzales*, 169 Fed. Appx. 501 (2006); *Calderon-Ortiz* v. *Gonzales*, 161 Fed. Appx. 721 (2006), and the BIA has sustained claims under *Penuliar* in a number of others, see, *e.g.*, *In re Phomphakdy*, No. A27 833 574, 2005 WL 3709252 (Dec. 30, 2005); *In re Pedroza-Ortiz*, No. A38 102 026, 2005 WL 3802196 (Nov. 30, 2005); *In re Flores-Garcia*, No. A43 643 177, 2005 WL 1766801 (May 2, 2005); *In re Alam*, No. A42 901 272, 2005 WL 1104326 (Mar. 29, 2005); *In re Ambartsumyan*, No. A71 118 792, 2005 WL 698329 (Feb. 16, 2005); *In re Rios-Zavala*, No. A73 891 180, 2005 WL 698515 (Feb. 4, 2005). Many more cases that raise a claim under *Penuliar* are pending before the Ninth Circuit, the BIA, and IJs. The result in those cases, and in future ones, is likely to be the same unless the Court grants certiorari in this case.

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[11] The automobile-theft statute under which respondent was convicted, California Vehicle Code § 10851(a), includes its own aiding-and-abetting provision. But *Penuliar*'s "categorical" holding would presumably apply even when the alien was convicted under a theft statute that does not explicitly include such a provision, because the general rule is that a defendant charged as a principal can be convicted as an aider and abettor. See 2 LaFave, *supra*, § 13.1(e), at 335 & nn. 89-90. Indeed, it appears that the two cases on which the Ninth Circuit relied in *Penuliar*—*Corona-Sanchez* (which involved California's general-theft statute) and *Martinez-Perez* v. *Gonzales*, 417 F.3d 1022 (9th Cir. 2005) (which involved California's grand-theft statute)—are cases of that type.

2. There is little reason to think that the Ninth Circuit's rule would be mitigated by the fact that, under the "modified categorical" approach, an alien will be deemed to have been convicted of a "theft offense" if it can be shown, based on documents in the record of the criminal case, that he was convicted as a principal. On the contrary, under the "modified categorical" holding of *Penuliar*, even an alien—like respondent—who was explicitly charged as a principal will not be deemed to have been convicted of a "theft offense" on the basis of the charging instrument (and corresponding judgment), because "an accusatory pleading against an aider or abettor may be drafted in an identical form as an accusatory pleading against a principal." 435 F.3d at 971.[12] The very fact that the Ninth Circuit ignored in erroneously holding that a violation of California Vehicle Code § 10851(a) is not categorically a theft offense—that criminal statutes uniformly treat aiders and abettors as indistinguishable from principals—means that the other materials that may be considered under the "modified categorical" approach are unlikely to distinguish between principals and aiders and abettors.

For aliens who pleaded guilty to the charge, the government might be able to establish that the conviction was for a "theft offense"—if it could show that the defendant admitted during the plea colloquy that he acted alone or was a "true principal." Cf. *Shepard* v. *United States*, 544 U.S. 13, 21 (2005) (transcript of plea colloquy may be used to determine whether defendant pleaded

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[12] The information to which respondent pleaded guilty alleged that he "did willfully and unlawfully drive or take a * * * 1992 Honda Accord * * * without the consent of [the owner] and with the intent to permanently or temporarily deprive the * * * owner of title to and possession of said vehicle." App., *infra*, 13a.

guilty to generic "burglary"). But plea colloquies are not always transcribed; when they have been transcribed, the transcripts are often unavailable or difficult to obtain; and when the transcripts can be obtained, they may reflect little more than that the defendant admitted committing the statutory offense. Similarly, for aliens who were found guilty after trial, the government might be able to establish that the conviction was for a "theft offense" if it could show that the jury was not instructed on an aiding-and-abetting theory and therefore must have found that the defendant was a principal. Cf. *Taylor*, 495 U.S. at 602 (jury instructions may be used to determine whether jury found defendant guilty of generic "burglary"). But transcripts of the jury charge (like transcripts of a plea colloquy) are often unavailable or difficult to obtain; and even when they can be obtained, they may show that, as is often the case, the jury was instructed that it could find the defendant guilty *either* as a principal *or* as an aider and abettor, in which case it will be impossible to know whether the defendant was convicted as a principal. For these reasons, there likely will be few cases in which an alien could readily be shown to have committed a "theft offense" under the Ninth Circuit's "modified categorical" approach.

3. Some aliens convicted of theft who are not removable for having been convicted of a "theft offense" under the Ninth Circuit's approach may be removable under Section 237(a)(2)(A)(i) of the INA, 8 U.S.C. 1227(a)(2)(A)(i), for having been convicted of a "crime involving moral turpitude." But that provision has a narrower reach than the one allowing removal of aggravated felons in at least two respects, and the former therefore excludes many theft crimes that are covered by the latter. First, while a crime involving moral turpi-

tude must have been committed within a certain period after admission to the United States (ordinarily five years) to qualify as a removable offense, 8 U.S.C. 1227(a)(2)(A)(i)(I), there is no such limitation for a theft offense, 8 U.S.C. 1101(a)(43)(G). Second, while a theft is ordinarily deemed to involve moral turpitude "only when a permanent taking is intended," *In re V-Z-S-*, 22 I. & N. Dec. 1338, 1350 n.12 (BIA 2000), a crime may be a "theft offense" under the INA "even if [the intended] deprivation is less than * * * permanent," *Penuliar*, 435 F.3d at 969 (citation omitted). Respondent himself relied on the requirement that a permanent taking be intended in arguing that his conviction was not for a crime involving moral turpitude, App., *infra*, 25a-27a, and the IJ, who ruled in respondent's favor on that issue, *id.* at 8a-9a, apparently did as well.

Apart from the fact that Section 237(a)(2)(A)(i) of the INA covers fewer theft crimes than the provision allowing removal of aggravated felons, there are several restrictions on the government's ability to remove an alien convicted of a crime involving moral turpitude that do not apply to an alien convicted of a theft offense. Unlike an alien convicted of a theft offense (and thus an aggravated felony), an alien convicted of a crime involving moral turpitude may be eligible for asylum, see 8 U.S.C. 1158(b)(2)(A)(ii) and (B)(i); is eligible for cancellation of removal if the alien is a lawful permanent resident, see 8 U.S.C. 1229b(a)(3); is not subject to expedited procedures for issuance of an order of removal, see 8 U.S.C. 1228(b); and is eligible to reenter the United States after five years, see 8 U.S.C. 1182(a)(9)(A).

But there is a more fundamental reason why the government's ability to remove an alien convicted of a crime involving moral turpitude would be unlikely to mitigate

the effect of *Penuliar*: the Ninth Circuit may well extend to a "crime involving moral turpitude" its holding that aiding and abetting is not encompassed by the generic definition of "theft offense." Indeed, it has already done so, albeit in an unpublished decision. In *Alvarado Velazquez* v. *Gonzales*, 131 Fed. Appx. 524 (9th Cir. 2005), the alien had been "charged with violating Cal. Veh. Code § 10851(a)" and "ultimately pleaded guilty to the charge." *Id.* at 525. The Ninth Circuit explained that "the record of conviction does not indicate whether he was charged or pleaded guilty to the count as a principal, as an accessory, or as an accomplice," and, citing *Penuliar*, it held that the government had therefore "failed to establish that Alvarado was convicted of a crime involving an element of moral turpitude." *Ibid.*

4. The holding of *Penuliar* may well be extended, not only to crimes involving moral turpitude, but to virtually every crime (in addition to a theft offense) that constitutes an aggravated felony under 8 U.S.C. 1101(a)(43), and, for that matter, to every crime that is a basis for removal, see 8 U.S.C. 1227(a)(2). The rationale for the Ninth Circuit's rule is that aiding and abetting a theft does not require the taking of or exercise of control over property, which the court deemed an essential element of the generic definition of "theft offense." *Penuliar*, 435 F.3d at 970. While, under the Ninth Circuit's approach, there may be some offenses whose generic definition is satisfied by aiding and abetting, there are not likely to be many. For example, one can aid and abet "murder," 8 U.S.C. 1101(a)(43)(A), without personally taking the life of another; one can aid and abet "rape," *ibid.*, without engaging in forcible sex; one can aid or abet a "crime of violence," 8 U.S.C. 1101(a)(43)(F), without using, attempting to use, or

threatening to use force, and without engaging in conduct that, by its nature, involves a substantial risk that force will be used, 18 U.S.C. 16; one can aid and abet "burglary," 8 U.S.C. 1101(a)(43)(G), without entering or remaining in a building, *Taylor*, 495 U.S. at 599; and so on. The novel principle applied by the Ninth Circuit—that a statutory offense does not categorically satisfy the generic definition of an offense when there is a possibility of aiding-and-abetting liability—thus has few obvious limits. And if the holding of *Penuliar* is taken to its logical conclusion, it will potentially affect far more than the 8000 removal orders or proceedings in the Ninth Circuit that involve a "theft offense."

5. Section 101(a)(43)(U) of the INA, 8 U.S.C. 1101(a)(43)(U), provides that the definition of "aggravated felony" includes "an attempt or conspiracy to commit an offense described in this paragraph." As part of proposals for comprehensive reform of the immigration laws, two pending bills would amend that provision to make explicit that the definition of "aggravated felony" includes aiding and abetting. The House bill would amend Section 101(a)(43)(U) to provide that "aggravated felony" includes "soliciting, aiding, abetting, counseling, commanding, inducing, procuring or an attempt or conspiracy to commit an offense described in this paragraph." Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong., 1st Sess. § 201(a)(3) (passed Dec. 16, 2005). Under the House bill, the amendment would "apply to offenses that occur before, on, or after the date of the enactment of this Act." *Id.* § 201(b). The Senate bill would amend Section 101(a)(43)(U) to provide that "aggravated felony" includes "aiding or abetting an offense described in this paragraph, or soliciting, counseling,

procuring, commanding, or inducing another, attempting, or conspiring to commit such an offense." Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong., 2d Sess. § 203(a)(5) (passed May 25, 2006). Under the Senate bill, the amendment would "apply to any act that occurred on or after the date of the enactment of this Act." *Id.* § 203(b)(1)(B).

No conference committee has yet been appointed to reconcile the two bills, which differ in certain significant respects. If a conference committee is convened, if a reconciled bill emerges and is enacted into law, and if the law amends Section 101(a)(43)(U) of the INA to explicitly include aiding and abetting and provides that the amendment applies to offenses antedating the law's enactment, it might be appropriate for this Court to grant certiorari, vacate the judgment of the court of appeals, and remand the case for further consideration in light of the new law. At this point, however, it is uncertain whether those events will come to pass. If they do, the Court can act on the petition accordingly.[13]

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[13] The fact that the current version of Section 101(a)(43)(U) includes attempt and conspiracy but not aiding and abetting, and that Congress is contemplating amending the provision to add aiding and abetting, does not mean that the Congress that enacted the current version intended to exclude aiding and abetting from the definition of "aggravated felony." Unlike aiding and abetting, attempt and conspiracy are distinct from the underlying offense, see, *e.g.*, *Pinkerton* v. *United States*, 328 U.S. 640, 643 (1946) (conspiracy); 2 LaFave, *supra*, § 11.2, at 207 (attempt), and thus would not constitute an aggravated felony unless Congress explicitly so provided. Indeed, the express inclusion of attempt and conspiracy, which often involve actions further removed from the underlying primary criminal conduct than aiding and abetting, only underscores the anomaly introduced by the Ninth Circuit's decision. Accordingly, as the Judiciary Committee Report accompanying the pending House bill explains, the purpose of adding aiding and

D. This Case Is The Most Suitable Vehicle For Deciding Whether The Ninth Circuit's Rule Is Correct

Under the INA, "[a] court may review a final order of removal only if * * * the alien has exhausted all administrative remedies available to the alien as of right." 8 U.S.C. 1252(d)(1). The Ninth Circuit treats this requirement as jurisdictional, see *Barron* v. *Ashcroft*, 358 F.3d 674, 677-678 (2004), as do a number of other courts of appeals, see *Popal* v. *Gonzales*, 416 F.3d 249, 252 (3d Cir. 2005); *Un* v. *Gonzales*, 415 F.3d 205, 210 (1st Cir. 2005); *Ramani* v. *Ashcroft*, 378 F.3d 554, 559 (6th Cir. 2004); *Foster* v. *INS*, 376 F.3d 75, 77 (2d Cir. 2004) (per curiam); *Wang* v. *Ashcroft*, 260 F.3d 448, 452 (5th Cir. 2001); *Fernandez-Bernal* v. *Attorney General of the United States*, 257 F.3d 1304, 1317 n.13 (11th Cir. 2001); *Akinwunmi* v. *INS*, 194 F.3d 1340, 1341 (10th Cir. 1999) (per curiam). In its petition for rehearing in *Penuliar*, in addition to challenging the Ninth Circuit's decision on the merits, the government contended that Penuliar had failed to exhaust his administrative remedies. Reh'g Pet. at 12-13, *Penuliar* v. *Gonzales* (No. 03-71578). The Ninth Circuit denied the rehearing petition without addressing that contention in its amended opinion.

Notwithstanding the Ninth Circuit's failure to address the issue, there is a substantial question whether Penuiliar satisfied the INA's exhaustion requirement, and thus whether the court of appeals had jurisdiction.[14]

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abetting to Section 101(a)(43)(U) is simply to "make[] clear" that it is included in the definition of aggravated felony and to "reverse" contrary "Ninth Circuit precedent." H.R. Rep. No. 345, 109th Cong., 1st Sess. 59 (2005).

[14] In his notice of appeal to the BIA, one of the "reason(s) for this appeal" identified by Penuliar was that "[i]t is not clear that the crimes

There is a similar exhaustion question in the other cases, cited above (at p. 16), in which the Ninth Circuit granted a petition for review on the basis of *Penuliar*. In this case, by contrast, no exhaustion question is present. Before both the IJ and the BIA, respondent unequivocally took the position that he had not been convicted of a "theft offense" (and thus an aggravated felony), App., *infra*, 16a-22a, 24a, 28a-31a, and he specifically argued that his crime of conviction was not a theft offense because a defendant can be convicted of violating California Vehicle Code § 10851(a) under an aiding-and-abetting theory, App., *infra*, 20a-21a, 29a-30a.

Since there is a threshold issue in *Penuliar* (and the other cases cited above) but not in this case, this case is the most suitable vehicle for deciding whether the generic definition of "theft offense" includes aiding and abetting. We are therefore seeking plenary review in this case. We are also filing a certiorari petition in

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set out in the Notice to Appear [for removal proceedings] are aggravated felonies." A.R. at 23, *Penuliar, supra*. And in his brief before the BIA, one of the two issues identified in the "Statement of Issues" was "[w]hether the Immigration Judge erred in finding Appellant had been convicted of an aggravated felony and [was] therefore[] ineligible for relief under § 240A(a) of the Immigration and Nationality Act," which governs cancellation of removal, 8 U.S.C. 1229b(a). A.R. at 7, *Penuliar, supra*. In the "Argument" section of the brief, however, Penuliar did not contend that either of the offenses on which his removal was based was not an aggravated felony. Instead, he raised only a constitutional argument concerning the availability of discretionary relief from removal. *Id.* at 9-10. And nowhere in either his notice of appeal or his brief did Penuiliar say anything that remotely resembles the aiding-and-abetting theory ultimately adopted by the court of appeals.

Penuliar, and asking the Court to hold the petition in that case pending its decision in this one.[15]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
PETER D. KEISLER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
DAN HIMMELFARB
Assistant to the Solicitor General
DONALD E. KEENER
JOHN ANDRE
Attorneys

JUNE 2006

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[15] In its brief in the court of appeals in this case, the government acknowledged that *Penuliar*'s holding was "circuit precedent" and "controlling of the outcome of th[e] petition for review," and that the petition therefore "should be remanded to the BIA for further proceedings in light of *Penuliar*." C.A. Br. 5. That acknowledgment is not an obstacle to review by this Court. A party has no obligation to "demand overruling of a squarely applicable, recent circuit precedent" when the precedent "was established in a case to which the party itself was privy and over the party's vigorous objection." *United States* v. *Williams*, 504 U.S. 36, 44 (1992). Instead, "a claim is preserved if made by the current litigant in 'the recent proceeding upon which the lower court[] relied for [its] resolution of the issue, and [the litigant] did not concede in the current case the correctness of that precedent.'" *United States* v. *Vonn*, 535 U.S. 55, 58-59 n.1 (2002) (quoting *Williams*, 504 U.S. at 45). Those conditions are satisfied here.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-74471
Agency No. A72-984-337

LUIS ALEXANDER DUENAS-ALVAREZ, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL,
RESPONDENT

On Petition For Review Of An Order
Of The Board Of Immigration Appeals

Submitted Apr. 13, 2006**
Decided Apr. 18, 2006

MEMORANDUM*

Before: SILVERMAN, MCKEOWN, and PEAZ, Circuit Judges.

Luis Alexander Duenas-Alvarez, a native and citizen of Peru, petitions pro se for review of the Board of

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** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Immigration Appeals' dismissal of his appeal of an immigration judge's order of removal. We have jurisdiction pursuant to 8 U.S.C. § 1252.

The IJ found that Duenas-Alvarez's conviction for taking a vehicle without consent in violation of California Vehicle Code § 10851(a) categorically met the definition of a theft offense and, as such, qualified as an aggravated felony under 8 U.S.C. § 1101(a)(43). As the government notes, we recently held that a violation of section 10851(a) does not categorically qualify as a theft offense because that section is broader than the generic definition of a theft offense under 8 U.S.C. § 1101(a)(3)(G). *See Penuliar v. Ashcroft*, 435 F.3d 961 (9th Cir. 2006). Accordingly, we remand this petition to the Board for further proceedings in light of *Penuliar*.

REMANDED.

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A72-984-337 - IMPERIAL Date: Aug. 6, 2004

In re: S-DUENAS-ALVAREZ, LUIS ALEXANDER

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: John J. Yap,
Assistant Chief Counsel

ORDER:

PER CURIAM. We adopt and affirm the decision of the Immigration Judge dated April 27, 2004. See Matter of Burbano, 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those the Immigration Judge articulated in his or her decision"). The respondent's conviction for auto theft constitutes an aggravated felony. Matter of V-Z-S-, 22 I&N Dec. 1338 (BIA 2000). Accordingly, the appeal is dismissed.

/s/ [ILLEGIBLE]
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Imperial, California

File No.: A 72 984 337

IN THE MATTER OF
LUIS ALEXANDER DUENAS-ALVAREZ, RESPONDENT

Apr. 27, 2004

IN REMOVAL PROCEEDINGS

CHARGES:

Section 237(a)(2)(A)(i) of the Immigration and Nationality Act, as amended, in that you have been convicted of a crime involving moral turpitude committed within five years after admission for which a sentence of one year or longer may be imposed.

Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, as amended, in that at any time after admission you have been convicted of an aggravated felony as defined in Section 101(a)(43)(G) of the Act, a theft offense for which the term of imprisonment is at least one year.

APPLICATIONS: None submitted; oral motion and written motion to terminate proceedings.

ON BEHALF OF RESPONDENT:
Elisa C. Brasil
Law Offices of Kaiser & Capeci
633 Battery Street, 6th Floor
San Francisco, California 94111

ON BEHALF OF DHS:
John Yap
Assistant Chief Counsel
1115 North Imperial Avenue
El Centro, California 92253

ORAL DECISION OF THE IMMIGRATION JUDGE

The Department issued the Notice to Appear January 16, 2004, setting forth the above two grounds of deportability as the basis for his removal from the United States. The document was personally served upon the respondent January 21, 2004, and filed with the Immigration Court February 3, 2004.

The respondent appeared before the Immigration Court via televideo conference from Calipatria State Prison in Calipatria, California. The respondent was placed under oath to tell the truth in these proceedings. It was determined that he was an inmate at the California Department of Corrections State Prison in Calipatria, California.

The respondent confirmed that his true name is as set forth on the Notice to Appear and that he had received a copy of the Notice to Appear. *See* Exhibit No. 1.

The respondent was advised of the purpose of the proceedings and why he was in Court. The respondent was advised of each of the rights for which he is entitled in these proceedings. The respondent stated that he understood the purpose of the proceeding and why he was in Court and each of the rights explained to him by the Court.

The respondent was read each of the allegations filed against him. He stated that he understood those and the two grounds of deportability were explained and he stated that he understood those.

The respondent confirmed that he received the list of legal services and the form setting forth his appeal rights in writing.

The respondent requested time to be able to retain counsel. That request was granted and the matter was continued.

At a subsequent hearing, the respondent appeared with counsel telephonically. Pursuant to his request and consent, the respondent confirmed that he wished to proceed with the attorney of record who had filed his E-28.

The respondent, through counsel, admitted that he is not a citizen or a national of the United States, that he is a native and citizen of Peru. The Court was advised that neither one of the respondent's parents were a citizen of the United States.

At the subsequent and final merits hearing in this matter, the respondent did advise the Court and the Court took into consideration that both of his parents are naturalized and become United States citizens. That is new information that he had gave after the original pleading was taken.

The respondent testified that some time before 1997 and 1998 his father became a United States citizen through naturalization and in 1998 his mother became a citizen. The respondent stated that his little sister became a citizen through his parents' naturalization because she was under 18 years of age at the time and that his big sister has also become a United States citizen by proceeding through the naturalization process on her own after being a lawful permanent resident for five years.

The respondent is now 29 years of age and testified that he was over the age of 18 when his parents became United States citizens.

The respondent admitted that he has been a lawful permanent resident of the United States since January 29, 1998. He immigrated through San Francisco, California. The respondent initially denied that he was convicted July 30, 2002, in the Superior Court of California, County of Marin, for the offense of taking a vehicle without consent in violation of Section 10851(a) of the California Vehicle Code. The respondent likewise denied allegation 8 and for that offense he was sentenced to confinement for a period of three years. The matter was continued to give the parties an opportunity to review the conviction records and counsel needed time to review the case and decide what country to designate in the event removal became necessary.

The matter was continued. At a subsequent hearing, the respondent, through counsel, admitted the conviction alleged in allegation no. 7 and the sentence that was imposed as alleged in allegation no. 8.

The issue remaining in the case is whether the respondent is subject to removal as charged. Counsel

was going to file with the Court and was given dates for doing so, a motion to terminate and was making an oral motion for the same purpose.

The matter came on for a hearing on today's date. Previously, counsel had filed a written motion to terminate. That is marked into evidence and admitted as Exhibit No. 2. The Government submitted their response which was marked as Exhibit No. 3 and admitted into evidence. Also admitted into evidence today is the conviction record consisting of Exhibit No. 4. It was admitted without objection.

Basically the parties are submitting the matter on the written motions.

Counsel for the respondent appearing today raised an issue about the delivery of the information in the charging document in the criminal court case having occurred after preparing and filing their motion to terminate with the Court and service that document upon Government counsel.

The parties basically asserted the arguments made in their pleadings.

No other documents or evidence was offered.

The Court has had an opportunity to review the respondent's pleading for a motion to terminate in this case. The Court's had an opportunity to review the Government's response. The Court's likewise had an opportunity to review the conviction record, more specifically the language of count 1.

The Court makes the finding at this time that the conviction suffered by the respondent as alleged in allegation no. 7, the taking of a vehicle without consent in violation of Vehicle Code Section 10851(a) of the

California Vehicle Code as charged specifically in this case and statutorily does not meet the definition of a crime involving moral turpitude. That ground of deportability is not sustained.

The Court is satisfied that the conviction does constitute an aggravated felony theft offense. The Court has taken into consideration that the last phrase that is alleged in the substantive charge is "with or without intent to steal the vehicle."

The Court does find, however, that it is clear that the purpose of this is without the consent of and with the intent to permanently or temporarily deprive the said owner of title to and possession of said vehicle meets the precedent decisions and authority in the definition of a theft offense under case law.

The Court is satisfied that this particular conviction as pled in Exhibit No. 4 meets the aggravated felony definition.

Having made that finding, the Court finds that the respondent is subject to removal from the United States. He has been convicted of a theft offense which is an aggravated felony.

The only issue remaining in the case is is he eligible for deportability for relief. No applications have been filed and the citizenship issues are apparent. No petitions have been filed on behalf of the respondent pursuant to counsel for the respondent.

The respondent designated Peru as the country for removal. The respondent indicates that he does have a concern about returning to Peru because he has been raised in the United States for many years, that he would have to start life over there. He is unfamiliar

with how to work in that country and other types of issues.

It does not appear that there is any valid or viable request being asserted for withholding of Article 3 protection under the Convention against Torture and, in fact, previously the Court was advised by counsel of record that no applications for relief would be filed if the charge of deportability was sustained that he was deportable with an aggravated felony conviction.

Based upon the evidence of record, the respondent is subject to removal on the aggravated felony ground. No applications apply in this case nor have been sought. The following order issues:

ORDER

THE RESPONDENT IS HEREBY ORDERED removed from the United States to Peru as charged based upon an aggravated felony theft conviction.

DATED: April 27, 2004

DENNIS R. JAMES
Immigration Judge

ABSTRACT OF JUDGMENT - PRISON COMMITMENT - DETERMINATE SINGLE, CONCURRENT, OR FULL-TERM CONSECUTIVE COUNT FORM

[Not to be used for multiple count convictions or for 1/3 consecutive sentences.]

[X] SUPERIOR COURT OF CALIFORNIA COUNTY OF MARIN [ ] MUNICIPAL BRANCH OR JUDICIAL DISTRICT		
PEOPLE OF THE STATE OF CALIFORNIA vs DEFENDANT LUIS ALEXANDER DUENAS-ALVAREZ AKA CII BOOKING #	DOB: 07-09-74 [ ] NOT PRESENT	CASE NUMBER SC123517A
COMMITMENT TO STATE PRISON ABSTRACT OF JUDGMENT	[ ] AMENDED ABSTRACT	
DATE OF HEARING 08-23-02	DEPT NO. D	JUDGE JOHN STEPHEN GRAHAM
CLERK KATHY BECK	REPORTER ELAINE NINKOVICH	PROBATION NO. OR PROBATION OFFICER STEVE SHAPIRO
COUNSEL FOR PEOPLE LORI FRUGOLI	COUNSEL FOR DEFENDANT DPD CHRISTINE O'HANLON	[X] APPTD.

1. Defendant was convicted of the commission of the following felony:

CNT	CODE	SECTION NUMBER	CRIME	YEAR CRIME COMMITTED	DATE OF CONVICTION (MO/DATE/YEAR)	CONVICTED BY: JURY	COURT	PLEA	TRIAL	TIME IMPOSED: YRS	MOS.
1	PC	10851(A)	AUTO THEFT	2002	07-30-02			X	U	3	0

2. ENHANCEMENTS charged and found to be true TIED TO SPECIFIC COUNTS (mainly in the PC 12022 series). List each count enhancement horizontally. Enter time imposed for each or "S" for stayed. DO NOT LIST enhancements stricken under PC 1385.

CNT	ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	TOTAL

3. ENHANCEMENTS charged and found to be true FOR PRIOR CONVICTION OR PRISON TERMS (mainly in the PC 667 series). List all enhancements horizontally. Enter time imposed for each or "S" for stayed. DO NOT LIST enhancements stricken under PC 1385.

ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	TOTAL

4. [ ] Defendant was sentenced pursuant to PC 667 (b)-(i) or PC 1170.12 (two-strikes)
5. FINANCIAL OBLIGATIONS (including any applicable penalty assessments):
   a. RESTITUTION FINE of: $2000 per PC 1202.4(b) forthwith per PC 2085.5
   b. RESTITUTION FINE of: $ ___ per PC 1202.45 suspended unless parole is revoked.
   c. RESTITUTION of: $____ per PC 1202.4(f) to [X] victim(s)* [ ] Restitution Fund
      (*List victim name(s) if known and amount breakdown in item 7, below.)
      (1) [X] Amount to be determined. (2) [ ] Interest rate of: ___% (not to exceed 10% per PC 1202.4(f)(3)(F)).
   d. [ ] LAB FEE of: $_____ for counts _____ per H&SC 11372.5(a).
   e. [ ] DRUG PROGRAM FEE of $150 per H&SC 11372.5(a). f. [ ] FINE of $ ____ per PC 1202.5
6. TESTING: [ ] AIDS [ ] DNA pursuant to [ ] PC 1202.1 [ ] PC 290.2 [ ] other (specify)
7. Other orders (specify):

**DEFENDANT TO RECEIVE NO TIME CREDITS IN THIS CASE AS ALL TIME CREDITS ATTRIBUTABLE TO SC 124735A- A MISDEMEANOR

8.

TOTAL TIME IMPOSED:	3	0

9. [ ] This sentence is to run concurrent with (specify):

10. Execution of sentence imposed
    a. [X] at initial sentencing hearing.
    b. [ ] at resentencing per decision on appeal
    c. [ ] after revocation of probation.
    d. [ ] at resentencing per recall of commitment (PC 1170(d).)
    e. [ ] other (specify):

11.

DATE SENTENCE PRONOUNCED	CREDIT FOR TIME SPENT IN CUSTODY	TOTAL DAYS: 0 INCLUDING	ACTUAL LOCAL TIME 0	LOCAL CONDUCT CREDITS 0	[ ] 4019 [ ] 2933.1	SERVED TIME IN STATE INSTITUTION [ ] DMH [ ] CDC [ ] CRC
08-23-02						

12. The defendant is remanded to the custody of the sheriff [X] forthwith [ ] after 48 hours excluding Saturdays, Sundays, and holidays.
    To be delivered to [X] the reception center designated by the director of the California Department of Corrections.
    [ ] other (specify):

CLERK OF THE COURT: I hereby certify the foregoing to be a correct abstract of the judgment made in this action.

DEPUTY'S SIGNATURE	DATE
/s/ Illegible	08-23-02

This form is prescribed under PC 1213.5 to satisfy the requirements of PC 1213 for determinate sentences. Attachments may be used but must be referred to in this document.

ABSTRACT OF JUDGMENT - PRISON COMMITMENT - DETERMINATE SINGLE, CONCURRENT, OR FULL-TERM CONSECUTIVE COUNT FORM

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APPENDIX E

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF MARIN

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

v.

LUIS ALEXANDER DUENAS-ALVAREZ AKA DUENAS,
LUIS ALEXANDER, DEFENDANT(S)

[Filed: Apr. 17, 2002]

INFORMATION

The District Attorney of the County of Marin, hereby accuses the said defendant(s) of the following crime(s), committed in the County of Marin, State of California:

* * * * *

Count: 001, on or about March 2, 2002, the crime of taking a vehicle without the owner's consent, in violation of section 10851(a) of the Vehicle Code, a felony, was committed by Luis Alexander Duenas-Alvarez, who at the time and place last aforesaid did willfully and unlawfully drive or take a certain vehicle, to wit: 1992 Honda Accord, California license number 3JHJ638,, then and there the personal property of Deborah and Michael Wood, D without the consent of and with the intent to permanently or temporarily deprive the said owner of title to and possession of said vehicle, with or without intent to steal the vehicle.

It is further alleged that said defendant(s), Luis Alexander Duenas-Alvarez, was convicted of the following felonies, to wit: auto burglary in violation of section 459 of the Penal Code, on or about December 15, 1992 in the Superior Court of the State of California, for the County of Marin, case number SC040996A; auto burglary in violation of section 459 of the Penal Code, on or about December 15, 1992 in the Superior Court of the State of California, for the County of Marin, case number SC041748A; possession of firearm by a felon in violation of section 12021(a) of the Penal Code, on or about February 17, 1994 in the Superior Court of the State of California, for the County of Marin, case number SC052654A, within the meaning of Penal Code section 1203(e)(4).

It is further alleged that said defendant(s) Luis Alexander Duenas-Alvarez, was on and about February 17, 1994, in the Superior Court of the State of California, for the County of Marin, case number SC052654A, convicted of the crime(s) of possession of firearm by a felon, in violation of section 12021(a) of the Penal Code, and that he/she then served a separate term in state prison and/or federal prison for said offense, and that he/she did not remain free of prison custody for, and did 7commit an offense resulting in a felony conviction during a period of five years subsequent to the conclusion of said term, within the meaning of Penal Code section 667.5(B).

All of which is contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the people of the State of California.

PAULA FRESCHI KAMENA
DISTRICT ATTORNEY FOR THE
COUNTY OF MARIN
STATE OF CALIFORNIA

By [ILLEGIBLE]
Assistant DISTRICT ATTORNEY

APPENDIX F

EXECUTIVE OFFICE OF IMMIGRATION APPEALS
BOARD OF IMMIGRATION APPEALS,
VIRGINIA

INS File No.: A#72-984-337

IN THE MATTER OF DUENAS-ALVAREZ,
LUIS ALEXANDER, RESPONDENT

Dated: 7/20/2004
[Filed: July 29, 2004]

BRIEF IN SUPPORT OF APPEAL

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I

ARGUMENTS

The Immigration Judge (I.J.) erred in determining that the actual offense which respondent was convicted of was a "theft offense" under Section 101(a)(43)(G) of the Immigration Nationality Act. The I.J. chose to overlook respondent's charging documents (the information) which basically added strength to respondent motion to terminate. The I.J. erroneously denied respondent's motion to terminate and based his decision on looking at the judgment of conviction and concluded without analyzing the specific characteristic of the respondent offense, that respondent's 2002 auto theft conviction, by the very title of the offense, satisfied the "theft offense" definition of aggravated felony.

The Government could not sustain their burden of proof with the information in respondent case which contains the language of the elements of crime, "permanently or temporarily deprived of said owner of title with or without intent to steal the vehicle" which would bear on the issue of whether respondent conviction qualified as an aggravated felony, because it cannot meet the generic definition of theft.

If theft in fact must involve a permanent taking, a conviction under a statute that allows conviction for temporary or permanent taking would not qualify as an aggravated felony under a theft theory. Such statutes would therefore be divisible: the portion that forbids permanent taking (or taking with intent to permanently deprive the owner) would constitute "theft"; the portion that is violated even if the intent is only temporary to deprive the owner would not constitute "theft". The information in respondent case does not specify

whether the conviction was under the permanent or temporary intent element. Therefore, the government was not able to sustain its burden of proving "theft" by clear and convincing evidence. Where the statute of conviction has distinct, numbered subdivisions and the record of conviction does not establish which subdivision constitutes the statute of conviction, the conviction will not be considered deportable unless each subdivision triggers deportation.

See Nevarez-Martinez v. INS, F.3d, 2003 WL 1878279 (9th Cir. April 16, 003). Respondent signed a plea agreement for Section 10851(a) V.C. to be punish by imprisonment in county jail, for not more than one year or in the state prison for a period of 16 months, 2 years or 3 years. The Government cannot tell from the mere fact of respondent conviction that respondent knew the vehicle was stolen, that the vehicle was taken or control was exercised with the requisite criminal intent.

U.S. v. Sacramento Cruz-Mandujano, 51 Fed. Appx. 721; (9th Cir. 2002). This court has set forth a generic definition of "theft offense" to require "a taking of property or an exercise of control over property." Section 10851(a) V.C. is likewise broader than the generic definition, so it is not categorically a theft offense. Congress is presumed to be familiar with Supreme Court precedent and to expect that its enactments will be interpreted accordingly. Therefore, in the absence of legislative history to the contrary, the Ninth Circuit must assume that Congress intended the term "theft offense" at Section 101(a)(43)(G) to be interpreted consistently with the Supreme Court's definition of the term in Taylor. The Ninth Circuit, following Taylor vs. United States, developed a modern, generic definition

for "theft offense." The court looked at common law larceny, but believed that Congress intended to broaden the definition because the IIRIRA of 1996. Taylor precludes the use of the specific definition used by the state of conviction. Rather, Taylor instructs that when Congress described predicate offenses, it meant to incorporate "the generic sense in which the term is now used in the criminal codes of most States." This guidance is particularly apt in the present context, because Congress used the words "theft offense" rather than just "theft," thus, including that the phrase ought to be read to incorporate different but closely related constructions in modern states statutes.

The modern, generic, and broad definition of the entire phrase "theft offense (including receipt of stolen property)" is a taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent. The legislative history of defining aggravated felonies under INA Section 101(a)(43) was to address serious crimes. See H.R. Rep. No. 104-22, at 5 (1995) ("[these amendments] address the problems of aliens who commit serious crimes wile they are in the United States and . . . give Federal law enforcement officials additional means with which to combat organized immigration crime.")

The immigration consequences to an alien convicted of an "aggravated felony" are significant. Given the profound consequences of the designation and the declare purpose of congress to target "serious crimes," it is doubtful that Congress intended to include crimes such as 10851(a) of the California Vehicle Code within the ambit of the definition of "serious crimes." The

Ninth Circuit in Corona-Sanchez has held California's basic theft statute, was an overbroad divisible statute, with respect to the generic definition of "theft" employed in the aggravated felony definition, because it included a number of nontraditional grounds of conviction, including theft of services, causing another to produce a false credit report, and aiding and abetting. Aiding and abetting conduct was not included within the generic definition of theft, since aiding and abetting a theft permitted conviction where the respondent neither took nor exercise control over property.

In Huerta-Guevara v. Ashcroft, the Ninth Circuit granted a petition for review and vacated a removal order predicated on an Arizona conviction of possession of a stolen vehicle, in violation A.R.S. Section 13-1802, holding the conviction did not fall within the generic definition of "theft offense" necessary to constitute an aggravated felony under INA section 101(a)(43)(G), adopted by the circuit en banc in Corona-Sanchez v. INS.

The court held under the categorical approach, that the Arizona statute was overbroad, with respect to the generic definition of "theft offense," in three respects. The Arizona statute prohibited "theft of services," which are not considered property and therefore fell outside the generic definition of theft. The statute prohibited aiding and abetting, which also fall outside the generic definition of theft. The Arizona statute "is a divisible statute, four subparts of which do not require intent." Therefore, "the conduct proscribed by Section 13-1802 extends beyond the term 'theft offense.' Accordingly, a conviction under A.R.S. Section 13-1802 does not facially qualify as a theft offense that is an aggravated felony under the INA".

II
CONCLUSION

The Judge erred in determining that respondent's 10851(a) of The California Vehicle Code conviction qualified as an aggravated felony under Section 101(a)(43)(G) of the INA. Also the I.J. erroneously denied Respondent's motion to terminate after overlooking Respondent's devisable statute in the Charging documents (The Information) presented by the government. Thus, the government did not meet their burden of proof with clear and convincing evidence.

Respectfully submitted,

DATED: 7/20/2004

/s/ [ILLEGIBLE]
DUENAS-ALVAREZ, LUIS ALEXANDER
In Pro se

APPENDIX G

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1115 NORTH IMPERIAL AVENUE
EL CENTRO, CALIFORNIA 92243

File No.: A72-984-337

IN THE MATTER OF, DUENAS-ALVAREZ,
LUIS ALEXANDER, RESPONDENT

[Filed: Mar. 30, 2004]

Next Hearing Date:	Mar. 31, 2004
Next Hearing Time:	8:30 A.M.
Before Honorable Immigration Judge:	Dennis R. James

MOTION TO TERMINATE

I. INTRODUCTION

Respondent, Mr. Luis A. DUENAS-ALVAREZ (A72-984-337), by and through his undersigned counsel, now hereby moves for this Court to terminate these Removal Proceedings. First, Respondent has not been convicted of a "crime involving moral turpitude" (hereinafter "CIMT"). California Vehicle Code (hereinafter "CVC") Section 10851(a) is not always a CIMT. Therefore, he is not removable under Immigration and Nationality Act (hereinafter "INA") Section 237(a)(2)(A)(i)

(regarding removability due to one CIMT conviction within five years of admission).

Second, CVC Section 10851(a) is not necessarily an "aggravated felony," as defined in INA Section 101(a)(43)(G) (regarding a "theft" offense with a one year term of imprisonment). Specifically, CVC Section 10851(a) is not a necessarily a "theft offense," as defined in INA Section 101(a)(43)(G). Hence, Respondent is not removable under INA Section 237(a)(2)(A)(iii) (regarding removability for a conviction of an "aggravated felony" at any time after admission).

That is, CVC Section 10851(a) is not CIMT, and CVC Section 10851(a) is not a "theft offense" (and therefore it is not an "aggravated felony"), as discussed below. As such, Respondent is not removable under INS Section 237(a)(2)(A)(i) (regarding a CIMT conviction), nor is he removable under INA Section 237(a)(2)(A)(iii) (regarding an "aggravated felony" "theft offense"). Because he is not removable under the only two charges within the charging document (*i.e.*, Form I-862, Notice to Appear), Respondent respectfully requests that this Court terminate these Removal Proceedings.

II. STATEMENT OF PERTINENT FACTS

Respondent is a male, native and citizen of Peru, who was admitted to the United States as a Lawful Permanent Resident Alien (hereinafter "LPR") in January 1998. He remains an LPR. On January 21, 2004, the Department of Homeland Security (hereinafter "DHS") alleged (at factual allegation number seven) that Respondent was convicted in the Superior Court of California, County of Marin, for his violation of CVC Section 10851(a) ("Taking a Vehicle Without Consent") on July 30, 2002. On that date, the DHS

charged Respondent as removable from the United States under INA Section 237(a)(2)(A)(i) (asserting that CVC Section 10851(a) is a CIMT) and under INA Section 237(a)(2)(A)(iii) (asserting that CVC Section 10851(a) is an "aggravated felony" "theft offense").

Respondent was convicted in the Superior Court of California, County of Marin, for a violation of CVC Section 10851(a) ("Taking a Vehicle Without Consent") in 2002, for which he was sentenced to the term of three years in the state prison.[1] *See* Form I-862 (Notice to Appear). Respondent now moves to terminate these Removal Proceedings, as a conviction under CVC Section 10851(a) is neither a CIMT conviction nor an "aggravated felony" conviction (because it is not a "theft offense").

III. ARGUMENT

A. RESPONDENT'S CONVICTION UNDER CVC SECTION 10851(a) IS NOT A CIMT CONVICTION; THEREFORE, RESPONDENT IS NOT REMOVABLE UNDER INA SECTION 237(a)(2)(A)(i)

In order to determine whether an individual has been convicted of a CIMT, one must first look to the statute under which the person has been convicted. *Taylor v. United States*, 495 U.S. 575, 602 (1990); *Ye v. INS*, 214 F.3d 1128 (9th Cir. 2000); *United States v. Rivera Sanchez*, 247 F.3d 905 (9th Cir. 2001); *Matter of L-V-C-*, Interim Decision 3382 (BIA 1999); *Matter of Tran*, 21 I&N Dec. 291 (BIA 1996); *Matter of Serna*, 20 I&N Dec. 579 (BIA 1992); *Beltran-Triado v. INS*, 213 F.3d 1179 (9th Cir. 2000). If the statute is overly-broad, including

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[1] Undersigned counsel received this information from Respondent's Public Defender, Christine O'Hanlon, Esq., of the Office of the Public Defender in San Rafael, California.

elements to many offenses, then one must look to charging papers and jury instructions to ascertain whether the alien's conduct meets the federal definition of a crime. *Taylor v. United States*, *supra*, 495 U.S. at 602. However, one can*not* look to the facts underlying the conviction in order to determine whether an alien has been convicted of an alleged crime. *Id.*

The Board of Immigration Appeals (hereinafter "BIA") has held a CIMT refers generally to conduct that is inherently base, vile, or depraved. *Matter of L-V-C-*, *supra* Int. Dec. 3382, *Matter of Tran*, *supra* 21 I&N Dec. at 291; *Matter of Serna*, *supra* 20 I&N Dec. at 579, *Beltran-Triado v. INS*, *supra* 213 F.3d at 1179 (convictions for false information on a Form I-9 and for a false Social Security Number are not convictions of CIMT's).

The BIA has determined that where the record of conviction does not show an *intent* to *permanently* deprive the owner, the conviction is not a CIMT. *Matter of D*, 1 I&N Dec. 143 (BIA 1941); *Matter of M*, 2 I&N Dec. 686 (BIA 1946); *Matter of N*, 3 I&N Dec. 723 (BIA 1949).

In *Matter of D*, *supra* 1 I&N Dec. at 143, the BIA held that former CVC Section 501 was not a CIMT because the temporary taking of a vehicle was "pure prankishness," as opposed to turpitudinous. Former CVC Section 501 was the forerunner statute to CVC Section 10851(a). Former CVC Section 501 has substantially the same elements as CVC Section 10851(a). Both provisions punish the "tak[ing] [of] a vehicle . . . with intent either to permanently or temporarily deprive the owner . . . whether with or without intent to steal the vehicle. . ." *See* CVC Section 10851(a).

Here, at factual allegation number seven, the DHS alleges that Respondent was convicted under CVC Section 10851 for "Taking a Vehicle Without Consent." *See* Form I-862 (Notice to Appear). Respondent was convicted for the offense of "Taking a Vehicle Without Consent," but such an offense is not turpitudinous because the record of conviction does not necessarily include the intent to *permanently* deprive the owner of his or her vehicle (and it may include only temporary deprivation). *Matter of M*, *supra* 2 I&N Dec. at 868; *Matter of N*, *supra* 3 I&N Dec. at 723. Such a "prank" is not turpitudinous. *Matter of D*, *supra* 1 I&N Dec. at 143.

Without the intent to *permanently* deprive the vicitm of his or her vehicle, Respondent's conviction under CVC Section 10851(a) is not a CIMT. Unless the DHS demonstrates that said conviction punished an intent to permanently deprive (within the record of conviction, such as the within the information, an indictment, or a complaint), this Court cannot sustain the charge of removal under INA Section 237(a)(2)(A)(i) because the BIA states that a crime for the temporary deprivation of a vehicle is not a CIMT. *Matter of M*, *supra* 2 I&N Dec. at 686; *Matter of N*, *supra* 3 I&N Dec. at 723.

Because Respondent's "prankishness" may have caused him to only temporarily deprive the owner of a vehicle, Respondent's conviction under CVC Section 10851 is not a CIMT conviction. *Matter of D*, *supra* I&N Dec. at 143. Because said conviction is not a CIMT conviction, Respondent is not removable under INA Section 237(a)(2)(A)(i). Consequently, this Court should dismiss this charge of removal.

B. RESPONDENT'S CONVICTION UNDER CVC SECTION 10851(a) IS NOT A CONVICTION FOR A "THEFT OFFENSE;" THEREFORE, RESPONDENT IS NOT REMOVABLE UNDER SECTION 237(a)(2)(A)(iii)

In order to determine whether an individual has been convicted of a "theft offense" (as defined in INA Section 101(a)(43)(G)), one must first look to the statute under which the person has been convicted. *Taylor v. United States, supra*, 492 U.S. at 602; *Ye v. INS, supra* 214 F.3d at 1128; *United States v. Rivera-Sanchez, supra* 247 F.3d at 905. If the statute is overly-broad, including elements to many offenses, then one must look to charging papers and jury instructions to ascertain whether the alien's conduct meets the federal definition of "theft." *Taylor v. United States, supra* 495 US. at 602. However, one can*not* look to the facts underlying the conviction in order to determine whether an alien has been convicted of an alleged crime. *Id.*

In order to qualify as a "theft offense" under INA Section 101(a)(43(G), it must meet the "uniform definition [of theft] independent of the labels used by state code." *Taylor* v. *United States, supra* 495 U.S. a 602; Ye *v. INS, supra* 214 F.3d at 1128; *USA v. Hector-Marquest*, 2000 US App. Lexis 18372 (9th Circuit, July 20, 2000) (reiterating the "uniform definition" approach for "theft offense"); *Matter of Bahta*, 22 I&N Dec. 1381 (BIA 2000) (using the "uniform definition" approach for "theft offenses"); *Matter of V-Z-S-*, 22 I&N Dec. 1338 (BIA 2000) (using the "uniform definition" approach for "theft offenses").

If the statute is overly broad, including elements to many offenses, then one must look to the record of conviction, including charging papers and jury instructions,

to ascertain whether the alien's actual conviction meets the "uniform definition" of a crime. *Taylor v. United States*, *supra* 495 U.S. at 602; *Matter of Sweetser*, Int. Dec. 3390 (BIA 1990); *Matter of Short*, 20 I&N Dec. 136 (BIA 1989); *Matter of Teixeria*, 21 I&N Dec. 316 (BIA 1996). In arriving at a "uniform definition" for theft, the United States Court of Appeals for the Ninth Circuit (hereinafter "Ninth Circuit") and BIA have recognized that the term "theft" is the "'popular name for larceny.'" *USA v. Hector-Marquez*, *supra* 2000 US App. Lex at 18372; *In Re V-Z-S-*, *supra* Int. Dec. at 3434.

The Ninth Circuit has held that the definition of "theft" is "a taking of property or an exercise of control over property." *USA v. Corona-Sanchez*, 291 F.3d 1201, 1205 (9th Cir. 2002). In *USA v. Corona-Sanchez*, *supra* 291 F.3d at 1207-08, the Ninth Circuit noted that California Penal Code (hereinafter "CPC") Section 484(a) ("petty theft") was broader than the generic federal definition of "theft" because CPC Section 484(a) allows for a conviction for only aiding and abetting (which falls outside the definition of "theft").

Likewise, CVC Section 10851(a) punishes,

> "any person who drives or takes a vehicle . . . with intent either to permanently or temporarily deprive the owner . . . *or any person who is a party or an accessory to or an accomplice in the driving or . . . taking . . .*" *See* CVC Section 10851(a) (emphasis mine).

As such, CVC Section 10851(a) is not necessarily within the definition of "theft" because "theft" does not include the mere aiding and abetting. One Panel of the Ninth Circuit held that a violation of CVC Section 10851(a) fell outside of the definition of "theft" (and therefore

was not an "aggravated felony") because it included punishing "a party, accessory or accomplice" in the "driving or . . . taking[,]" citing *USA v. Corona-Sanchez, supra* 291 F.3d at 1207-08. *USA v. Cruz-Mandujano*, 51 Fed. Appx. 721, 2002 U.S. App. LEXIS 24417 (unpub.) (Respondent includes this citation here because these facts and issues before this Court are the same as those found within this Ninth Circuit decision).

Because CVC Section 10851(a) is overly broad, one must look to the record of conviction to determine the offense for which Respondent was convicted. *Taylor v. United States, supra* 495 U.S. at 602; *Matter of Sweetser, supra* Int. Dec. at 3390; *Matter of Short, supra* 20 I&N Dec. at 136; *Matter of Teixeira, supra* 21 I&N Dec. at 316. Because Respondent may have been convicted as "a party, accessory or accomplice," Respondent's conviction does not necessarily fall within the definition of "theft." As such, this Court cannot find that Respondent was convicted of a "theft offense," as defined in INA Section 101(a)(43)(G). *Taylor v. United States, supra* U.S. at 602; *USA v. Cornora-Sanchez, supra* 291 F.3d at 1207-08).

As Respondent has not necessarily been convicted of "a theft offense . . . for which the term of imprisonment [is] at least one year[,]" Respondent has not been convicted of an "aggravated felony," as defined within INA Section 101(a)(43)(G). Because he has not necessarily been convicted of an "aggravated felony," Respondent is not removable under INA Section 237(a)(2)(A)(iii).

V. CONCLUSION

Because Respondent has not necessarily been convicted of either a CIMT or a "theft offense," he is

neither removable under INA Section 237(a)(2)(A)(i) (requiring a CIMT conviction) nor INA Section 237(a)(2)(A)(iii) (requiring a "theft" offense). That is, Respondent is not removable under either of the only two removal charges contained within the charging document. For the foregoing reasons, Respondent respectfully requests that this Court terminate these Removal Proceedings, permitting Respondent to remain an LPR.

Date: 03-29-2004

Respectfully submitted:

/s/ [ILLEGIBLE]
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Attorney for Respondent

FILED
AUG 23 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(2)

No. 05-1629

IN THE

Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL
Petitioner,

v.

LUIS ALEXANDER DUENAS-ALVAREZ,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a "theft offense," which is an "aggravated felony" under the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(G), includes aiding and abetting.

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IN THE

Supreme Court of the United States

No. 05-1629

ALBERTO R. GONZALES, ATTORNEY GENERAL
Petitioner,

v.

LUIS ALEXANDER DUENAS-ALVAREZ,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Luis Alexander Duenas-Alvarez files this brief in opposition to the petition for a writ of certiorari filed by Alberto R. Gonzales, Attorney General.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unreported. The decisions of the Board of Immigration Appeals (Pet. App. 3a) and the Immigration Judge (Pet. App. 4a-10a) are also unreported.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. The Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(G), defines "aggravated felony" to include "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year."

2. The California Vehicle Code provides in relevant part:

> Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, or any person who is a party or accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense ....

Cal. Veh. Code § 10851(a).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. § 1227(a)(2), provides that aliens who have been convicted of certain types of offenses, including aggravated felonies, are removable. The INA provides a list of offenses that qualify as aggravated felonies. *See* 8 U.S.C. § 1101(a)(43). This list includes "a theft offense (including receipt of stolen property) ... for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(G).

Taylor v. *United States*, 495 U.S. 575, 599-602 (1990), sets forth the two-part test that courts apply in determining whether a conviction under a particular statute qualifies as a conviction for the relevant offense under the INA.[1] The first

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[1] *Taylor* concerned the question whether an offense was a "burglary" for purposes of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. § 924(e), but courts have applied the same analytical framework in this context. *See, e.g., Soliman* v. *Gonzales*, 419 F.3d 276, 284 (4th Cir. 2005); *Ye* v. *INS*, 214 F.3d 1128, 1132-1133 (9th Cir. 2000).

step—the "categorical" approach—asks whether all conduct covered by the statute of conviction falls within the "generic" definition of the relevant offense (i.e., "the generic sense in which the term is now used in the criminal codes of most States," *id.* at 598). If the statute of conviction is entirely within the generic definition, then the conviction qualifies categorically as the relevant offense. If the statute of conviction is broader than the generic definition, however, then the court moves to the second step—the "modified categorical" approach. Under this step, the court reviews certain documents in the case to determine whether the particular offense of which the defendant has been convicted falls within the scope of the generic definition.

2. Duenas-Alvarez, a native and citizen of Peru, became a lawful permanent resident of the United States in January 1998. Pet. App. 7a. In 2004, the Department of Homeland Security (DHS) initiated removal proceedings against Duenas-Alvarez, charging him with removability under two sections of the INA. DHS alleged that Duenas-Alvarez was removable pursuant to § 237(a)(2)(A)(i) of the INA, 8 U.S.C. § 1227(a)(2)(A)(i), for having been convicted of a crime involving moral turpitude. Pet. App. 4a-5a. DHS also alleged that Duenas-Alvarez was removable under § 237(a)(2)(A)(iii) of the INA, 8 U.S.C. § 1227(a)(2)(A)(iii), for having been convicted of an aggravated felony, namely a theft offense for which the term of imprisonment is at least one year, 8 U.S.C. § 1101(a)(43)(G). Pet. App. 4a-5a.

Both charges of removability were based on Duenas-Alvarez's 2002 conviction under California Vehicle Code § 10851(a) for the unlawful driving or taking of a vehicle. Duenas-Alvarez had been charged in the Superior Court under § 10851(a), pled guilty to the charge, and was sentenced to three years of imprisonment. Pet. App. 7a-8a.

3. In proceedings before the Immigration Judge (IJ), Duenas-Alvarez argued that the California offense of unlawful driving or taking of a vehicle under § 10851(a) was neither a crime involving moral turpitude under 8 U.S.C. § 1227(a)(2)(A)(i), nor an aggravated felony under 8 U.S.C.

§ 1101(a)(43)(G). Pet. App. 23a-24a. The IJ agreed with Duenas-Alvarez that the crime was not a crime involving moral turpitude, but determined that it was a "theft offense," and thus an aggravated felony, under the INA. *Id.* at 8a-9a. Accordingly, the IJ ordered Duenas-Alvarez removed to Peru. *Id.* at 10a.

Duenas-Alvarez appealed this decision to the Board of Immigration Appeals (BIA), reiterating his argument that the crime of unlawful driving or taking of a vehicle under California Vehicle Code § 10851(a) was not a "theft offense," and thus not an aggravated felony within the meaning of 8 U.S.C. § 1101(a)(43)(G). Pet. App. 18a-22a. The BIA dismissed Duenas-Alvarez's appeal, adopting the decision of the IJ that Duenas-Alvarez's conviction under § 10851(a) "constitutes an aggravated felony." *Id.* at 3a. Duenas-Alvarez then petitioned for review in the Ninth Circuit.

4. While his petition was pending, the Ninth Circuit issued its decision in *Penuliar* v. *Ashcroft*, 395 F.3d 1037 (2005), *amended*, 435 F.3d 961 (9th Cir.), *petition for cert. filed*, 75 U.S.L.W. 3001 (June 22, 2006) (No. 05-1630). Penuliar was charged with removability based in part on a conviction for unlawful taking or driving of a vehicle under California Vehicle Code § 10851(a).[2] The question before the Ninth Circuit was whether this conviction qualified as a "theft offense" under the INA.

The original decision applied the two-step analysis under *Taylor* in making this determination. The court first observed that, for purposes of the generic definition, the Ninth Circuit defines "theft offense" as "a taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." 395 F.3d at 1044 (quotation omitted).

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[2] The charge of removability was also based on Penuliar's conviction for evading an officer under California Vehicle Code § 2800.2(a). That aspect of the Ninth Circuit's holding is not at issue in this case and was not addressed by the petition for certiorari in *Penuliar*.

The court found that California Vehicle Code § 10851(a) is "broader than the generic definition of a 'theft offense.'" 395 F.3d at 1044. It reasoned that the language of the statute "makes plain" that it includes "accessory or accomplice liability," *id.*; the statute expressly includes individuals who are a "party or an accessory to or an accomplice in the driving or unauthorized taking or stealing" of a vehicle, Cal. Veh. Code § 10851(a). Accordingly, § 10851(a) "does not categorically qualify as a 'theft offense' within the meaning of 8 U.S.C. § 1101(a)(43)(G)." 395 F.3d at 1044-1045.

Under the modified categorical approach, the court held that the IJ erred in finding that Penuliar had been convicted of a "theft offense." 395 F.3d at 1046. Accordingly, the court granted the petition for review. *Id.*

The Government filed a petition for panel rehearing and rehearing en banc. The petition argued that § 10851(a) qualifies as an aggravated felony because aiding and abetting is within the generic definition of "theft offense." Reh'g Pet. 4-12. The petition also contended that Penuliar had failed to exhaust his administrative remedies by failing to present to the BIA the claim that the offenses of conviction were not aggravated felonies. *Id.* at 12-13.

The Ninth Circuit denied the petition for rehearing and issued an amended opinion. 435 F.3d 961. The opinion remained largely the same, but, as relevant here, included a new footnote responding to the Government's argument regarding aiding and abetting liability. Specifically, the court concluded that the Government's assertion "is foreclosed by our decision in *Martinez-Perez* [v. *Gonzales*, 417 F.3d 1022, 1028 (9th Cir. 2005)] (holding that a conviction for grand theft under California Penal Code § 487(c) was not a 'theft offense' within the meaning of the INA because a defendant could 'be convicted of a substantive violation . . . based on an aiding and abetting theory alone')." 435 F.3d at 970 n.6.

5. After the amended decision in *Penuliar* issued, the Ninth Circuit granted Duenas-Alvarez's petition for review. Pet. App. 1a-2a. The court noted that the IJ had held that Duenas-Alvarez's conviction for unlawful driving or taking

of a vehicle "categorically met the definition of a theft offense." *Id.* at 2a. Because the Ninth Circuit had recently held in *Penuliar* that "a violation of Section 10851(a) does not categorically qualify as a theft offense because that section is broader than the generic definition," the court "remand[ed] th[e] petition to the [BIA] for further proceedings in light of *Penuliar*." *Id.*

REASONS FOR DENYING THE PETITION

The petition for certiorari is based on an erroneous reading of *Penuliar* and mistaken assumptions about California law. In the Government's view, *Penuliar* held that the generic definition of "theft offense" does not include aiding and abetting liability. The Government argues that certiorari must be granted because this holding is incorrect, conflicts with decisions in other circuit courts, and threatens to have far-reaching consequences on the immigration system. Pet. 6.[3] None of these arguments warrants review of the question presented or any other aspect of this case or *Penuliar*.

The Government's critical error lies in misapprehending the distinction between "aiding and abetting" liability, on the one hand, and "accessory" liability, on the other. The statute at issue, California Vehicle Code § 10851(a), explicitly covers "accessory" liability; under California law, the term "accessory" is defined to refer to accessories after the fact (and is distinguishable from aiders and abettors), *compare* Cal. Penal Code § 32 *with* Cal. Penal Code § 31. *Penuliar* held that because § 10851(a) reaches accessories after the fact, it exceeded the scope of the generic definition of

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[3] The Government also notes (Pet. 23-25) that this case is a better vehicle for addressing the question presented than *Penuliar*. The Government is correct that, unlike *Penuliar*, this case will not entail consideration of the preliminary question whether respondent exhausted his administrative remedies. However, regardless of vehicle problems, certiorari is not warranted in either case—all the reasons presented by respondent to deny this petition apply equally well to the petition filed in *Penuliar*.

"theft offense." Contrary to the Government's view, the holding of *Penuliar* does not rest on the proposition that aiding and abetting liability is not included in the generic definition of "theft offense."

Once this misunderstanding of *Penuliar* and California law is corrected, it is clear that certiorari is not warranted in this case or *Penuliar*. A decision by this Court on the question presented—regarding aiding and abetting liability—would have no effect on the outcome of this case; *Penuliar*'s central holding regarding accessory liability would remain intact. For similar reasons, the supposed circuit split identified by the Government does not exist; the cases cited as allegedly conflicting with *Penuliar* address aiding and abetting liability, not accessories after the fact.

Certiorari should be denied for the additional reason that the Ninth Circuit's ultimate holding—that California Vehicle Code § 10851(a) is not a categorical "theft offense"—is correct. This is so even if the Court accepts the Government's view of *Penuliar*, as there is an alternate ground for affirmance. As noted, § 10851(a) reaches accessories after the fact. And accessories after the fact are undoubtedly beyond the scope of the generic definition of "theft offense": under the laws of all fifty states, the District of Columbia, and the federal government, accessories after the fact are *not* liable for the crime of the principal. Nor do modern theft statutes indicate that they reach the conduct of an accessory after the fact. Thus, regardless of the Court's understanding of *Penuliar* or its views on the question presented, the outcome of this case and *Penuliar* is correct.

Finally, this Court's review would be premature: On June 29, 2006—after the Government filed its petitions in this case and in *Penuliar*—the Ninth Circuit granted en banc review in *United States* v. *Vidal*, 426 F.3d 1011 (9th Cir. 2005). *See* 453 F.3d 1114 (9th Cir. 2006). *Vidal* addresses the scope of liability under California Vehicle Code § 10851(a) and considers whether that statute qualifies categorically as a "theft offense" for purposes of the United States Sentencing Guidelines. The en banc court's decision

will bear on questions at issue in this case, such as whether § 10851(a)'s inclusion of accessory after the fact liability means that it is not a categorical "theft offense." Because the Ninth Circuit has not yet come to rest on the scope of § 10851(a) relative to the generic definition of "theft offense," the petition for certiorari should be denied.

I. THE GOVERNMENT MISCONSTRUES *PENULIAR* BECAUSE IT FAILS TO RECOGNIZE THE DISTINCTION BETWEEN "AIDING AND ABETTING" AND "ACCESSORY AFTER THE FACT" LIABILITY

The Government's petition for certiorari erroneously collapses two distinct categories: "aiding and abetting" liability, on the one hand, and "accessory after the fact" liability, on the other. As a result, the Government misconstrues the holding of *Penuliar*.

The underlying issue in *Penuliar* and in this case was whether, under step one of *Taylor*, California Vehicle Code § 10851(a) categorically qualifies as a "theft offense" and, in turn, as an "aggravated felony" under the INA. The resolution of this question, the Government concedes (Pet. 3) depends upon whether § 10851(a) reaches conduct that is not included in the generic definition of "theft offense." Although the Government is correct that the Ninth Circuit held that the California vehicle theft statute did not qualify categorically as a "theft offense" under the INA, the Government is mistaken as to the reason for this holding.

The statute at issue, California Vehicle Code § 10851, expressly covers "accessory" liability. California law defines "accessory" as an accessory after the fact. *See* Cal. Penal Code § 32; *see also* n.6, *infra*. *Penuliar* considered whether, in light of the liability of accessories, the statute was broader than the generic definition of "theft offense." The court held that a conviction under § 10851(a) is not a categorical "theft offense"; § 10851(a) is broader than the generic definition of "theft offense" under 8 U.S.C. § 1101(a)(43)(G) because "[a]s the statute makes plain," § 10851(a) includes accessory liability. 395 F.3d at 1044.

In the Government's view (and despite the court's express consideration of the term "accessory"), the court's holding instead rests on the conclusions that § 10851(a) encompasses *aiding and abetting* liability and that aiding and abetting is not covered by the generic definition of "theft offense." Pet. 5. There is a disconnect, however, between the Government's view and the language of the case itself. The Government's reading is especially suspect in light of the fact that the court's original opinion did not discuss aiding and abetting liability under California Vehicle Code § 10851(a) at all. Rather, the court addressed aiding and abetting liability under § 10851(a) in a footnote in its *amended* opinion, in response to the Government's petition for rehearing raising that issue. 435 F.3d at 970 n.6. The addition of this footnote merely reinforces the conclusion that the holding does not pertain to aiding and abetting liability.

The Government's approach to the holding of *Penuliar* appears to stem from its faulty assumption (reflected throughout its petition) that the court's separate analyses of aiding and abetting liability and accessory liability can be collapsed because all the terms mean the same thing. The Government purports to justify this approach to the terms and the *Penuliar* opinion by asserting:

> In modern criminal codes, there is no meaningful distinction among "party," "accessory," "accomplice," and "aider and abettor." *See* 2 Wayne R. LaFave, *Substantive Criminal Law* §§ 13.1-13.2 (2d ed. 2003). The Ninth Circuit appears to have used the terms interchangeably. *See Penuliar*, 435 F.3d at 969-970.

Pet. 7 n.3; *see also* Pet. 7-10.

The Government is simply incorrect. First, the Government is mistaken as to the distinctions modern criminal codes draw with respect to these terms. Indeed, it misapprehends what LaFave's treatise states on this issue. As explained in more detail below, distinctions remain with respect to accessory after the fact liability, even if certain

categories of parties to a crime are treated the same. *See* 2 LaFave § 13.1. Second, and most important, because California law (like the laws of other states and the federal government) draws a distinction regarding accessories after the fact, *see* Cal. Penal Code § 32, *Penuliar* should not be read as using the term interchangeably with aiders and abettors or any other party to a crime.

A. Accessory After The Fact Liability Remains A Distinct Category

At common law, there were multiple categories of parties to a crime: (1) "principal in the first degree; (2) "principal in the second degree," also known an aider and abettor present; (3) "accessory before the fact," also known as an aider and abettor not present; and (4) "accessory after the fact." 2 LaFave § 13.1. In brief, the principal in the first degree is the actor who engages in the criminal act (*id.* § 13.1(a)); principals in the second degree are present at the crime and "aid, counsel, command, or encourage the principal in the first degree in the commission of that offense" (*id.* § 13.1(b)); and the accessory before the fact is not present at the crime but "orders, counsels, encourages, or otherwise aids and abets another to commit a felony" (*id.* § 13.1(c)). By contrast, accessories after the fact are involved only after the crime has been committed and are "not deemed a participant in the felony." *Id.* § 13.1.

As LaFave's treatise notes, modern penal codes have done away with all but one of these distinctions. The distinctions regarding principals and aiders and abettors (present and not present) have been abandoned; these categories of participant "have all played a part in the commission of the crime and are quite appropriately held accountable for its commission." 2 LaFave § 13.6(a). In contrast, however, an accessory after the fact "had no part in causing the crime." *Id.* Instead, the offense of the accessory after the fact is considered to be "that of interfering with the processes of justice and is best dealt with in those terms." *Id.* As de-

scribed in Part III, *infra*, the state criminal codes confirm this view.[4]

Thus, and contrary to the Government's suggestion, there is in fact a "meaningful distinction" between accessory after the fact liability and aiding and abetting liability.

B. The Ninth Circuit Did Not Use The Term "Accessory" Interchangeably With "Aider And Abettor"

In the Government's view, *Penuliar*'s discussion of "accessory" liability should not be taken at face value because the Ninth Circuit "appears to have used the terms [accessory and aider and abettor] interchangeably." Pet. 7 n.3.[5] There is no basis to conclude that this is so.

In fact, under California law, the term "accessory" is a *defined term*, and is manifestly not interchangeable with

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[4] In addition to LaFave's treatise, the Government cites a handful of other authorities for the proposition that all parties to a crime are treated as principals. Most of these concern the proposition that there is no distinction in terms of liability between aiders and abettors and principals. *See, e.g.*, Pet. 8 (quoting *Nye & Nissan* v. *United States*, 336 U.S. 613, 618 (1949) (observing that it is "well engrained in the law" that one who aids or abets the commission of an act "is as responsible for that act as if he committed it directly")). One cited authority expressly refers to accessories, namely *Hammer* v. *United States*, 271 U.S. 620, 628 (1926), which the Government relies upon for the proposition that "by the early twentieth century many statutes had 'abolishe[d] the distinction between principals and accessories.'" Pet. 8 (quoting *Hammer*, 271 U.S. at 628 (alteration in original)). The term "accessories" in that quote, however, refers to accessories *before the fact* and *not accessories after the fact*, like the California statute. *Hammer* explains: "Section 332 [now § 2] of the Criminal Code abolishes the distinction between principals and accessories and makes them all principals. One who induces another to commit perjury is guilty of subornation under section 126, and by force of section 332 (Comp. St. s 10506) is also guilty of perjury." 271 U.S. at 628. Thus, *Hammer* merely confirms that the federal statute treats accessories before the fact (aiders and abettors not present) the same as principals; it does not speak to accessories after the fact. *See also* 18 U.S.C. § 2 (listing aiders and abettors, but not accessories after the fact, as principals).

[5] As support for this proposition, the Government simply cites the pages of the opinion in which the court applied the categorical approach. *See* Pet. 7 n.3 (citing *Penuliar*, 435 F.3d at 969-970).

"aiding and abetting." An "accessory" is defined in § 32 of the California Penal Code, which states that the term applies *only* to accessories after the fact—those who assist the principal *after* the commission of the offense.[6] In contrast, California Penal Code § 31 defines those liable as principal, and includes those who "aid and abet in [the offense's] commission"; it does *not* include accessories after the fact or reach the conduct of accessories after the fact.[7]

Case law in California confirms that "accessories," a term defined in reference to § 32 as accessories after the fact, *see, e.g.*, *People* v. *Coffman*, 96 P.3d 30, 108 (Cal. 2004), are not equivalent to aiders and abettors. In addition to the difference in the offense conduct, accessories are not liable, as aiders and abettors are, for the underlying offense of the principal. *See People* v. *Mitten*, 112 Cal. Rptr. 713, 715 (Cal. Ct. App. 1974) ("[I]n California one who is an accessory to a

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[6] Section 32 of the California Penal Code provides:

> Every person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony.

Indeed, the term "accessory" necessarily invokes § 32 because California has abrogated the distinction between accessories before the fact and principals and between principals in the first and second degree. *See* Cal. Penal Code § 971.

[7] California Penal Code § 31 defines principals as follows:

> WHO ARE PRINCIPALS. All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, and all persons counseling, advising, or encouraging children under the age of fourteen years, lunatics or idiots, to commit any crime, or who, by fraud, contrivance, or force, occasion the drunkenness of another for the purpose of causing him to commit any crime, or who, by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crime so committed.

felony thereby commits a crime which is separate and distinct from the felony itself. The difference is sometimes overlooked. There often seems a tendency to consider the accessory as responsible in some manner for the initial felony. [This is an] erroneous concept."); *People* v. *Nguyen*, 26 Cal. Rptr. 2d 323, 335 (Cal. Ct. App. 1993) ("In contrast [to an aider and abettor], an accessory's criminal liability does not arise out of some manner of responsibility for the commission of the offense."); *cf. People* v. *Horton*, 906 P.2d 478, 506 (Cal. 1995) ("A mere accessory ... is not an accomplice.").

California law thus provides a clear-cut distinction between an "accessory" (i.e., accessory after the fact) and an "aider and abettor" or other party to an offense.[8] This distinction has existed, moreover, since 1872, long before any vehicle statutes were in effect.[9] Accordingly, the Ninth Circuit should not be presumed to have ignored the unambiguous meaning of the term "accessory" in California Vehicle Code § 10851(a) and used the term interchangeably with "aider and abettor." *Penuliar*, properly read, holds that § 10851(a) exceeds the scope of the generic definition of "theft offense" because the statute reaches accessory after the fact liability.

Indeed, one of the members of the *Penuliar* panel has explained that *Penuliar*'s holding pertains to accessory liability. *Vidal*, 426 F.3d at 1014 (discussed in Part IV), concerned the related question whether § 10851(a) categorically qualifies as a "theft offense" for purposes of the United States Sentencing Guidelines. The majority in that case did not reach the question whether the inclusion of accessory liability in that provision rendered it beyond the scope of the

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[8] This distinction is hardly unique to California law. *See* Part III, *infra* (outlining this distinction in state and federal statutes).

[9] In that year, sections 31 and 32 of California Penal Code were first enacted, as was California Penal Code § 971, which abrogated the distinction between principals in the first and second degree and accessories before the fact.

generic definition. *Id.* at 1016.[10] In a dissent, however, Judge Browning addressed this question and, in so doing, provided an overview of California law and insight into *Penuliar*.

Judge Browning explained that "California law does not include 'accessories' (i.e., 'accessories after the fact') as principals." *Vidal*, 426 F.3d at 1018 (Browning, J., concurring in part and dissenting in part). Section 10851(a), he noted, expressly reaches accessories—those "who sufficiently and knowingly aid a principal after the commission of the offense." *Id.* at 1019. "Comparing the statute of conviction to the generic predicate offense definition," Judge Browning deemed it "beyond dispute that, by criminalizing accessories, § 10851(a), covers a broader range of conduct than does the Sentencing Guidelines generic 'theft offense.'" *Id.* Thus, "a conviction under § 10851(a) cannot categorically qualify as a 'theft offense' for sentence enhancement within the meaning of 8 U.S.C. § 1101(a)(43)(G)." *Id.* And for this last proposition, Judge Browning expressly cited *Penuliar*, 395 F.3d at 1044-1045. *Id.*

II. THIS CASE AND *PENULIAR* DO NOT IMPLICATE THE QUESTION PRESENTED AND DO NOT CREATE A CIRCUIT SPLIT

The Government's understanding of the holding in *Penuliar* is premised on the faulty assumption that the court used the term "accessory" interchangeably with "aider and abettor." Once that assumption is discarded, and accessory is given its correct meaning, the arguments for a grant of the petition for a writ of certiorari fall away.

In fact, the question presented does not even pertain to the holding in *Penuliar*. With this petition for certiorari, the Government asks this Court to hold that the generic defini-

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[10] The *Vidal* majority concluded that this issue was not dispositive in light of the outcome under the modified categorical approach. 426 F.3d at 1016 ("this point is neither developed, nor would it make any difference in this case").

tion of "theft offense" reaches aiders and abettors. But, as explained above, *Penuliar* holds that § 10851(a)'s inclusion of liability for accessories—as in accessories after the fact—renders it beyond the scope of the generic definition of "theft offense" under the INA. The decision the Government seeks thus will not alter the outcome of the Ninth Circuit's decision in this case or *Penuliar*. Indeed, it will not even address the central holding of the cases. For that reason, the Court should deny the petition for a writ of certiorari.

For similar reasons, this case does not create or implicate a circuit split. The Government contends there is a four-to-one split, citing cases from the First, Second, Seventh, and Eighth Circuits allegedly in conflict with *Penuliar* and this case.[11] Pet. 11-15. With these cases, the Government is intent on showing that other circuits do not categorically hold that aiding and abetting liability is outside the scope of the generic definition of the relevant crime. These cases, however, are not in conflict with the Ninth Circuit's holding in this case or *Penuliar*. As noted, *Penuliar* held that California Vehicle Code § 10851(a) reached conduct beyond the generic definition of "theft offense" because it included liability for accessories after the fact. None of the cases the Government cites addresses, much less rejects, this conclusion.

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[11] In *United States* v. *Hathaway*, 949 F.2d 609, 610-611 (2d Cir. 1991) (per curiam), the Second Circuit held that aiding and abetting liability is included in the generic definition of arson for purposes of the ACCA. Likewise, *United States* v. *Groce*, 999 F.2d 1189, 1192 (7th Cir. 1993), holds that, within the meaning of the ACCA, the generic definition of burglary "extends to the context of aiding and abetting." *United States* v. *Mitchell*, 23 F.3d 1, 3-4 (1st Cir. 1994) (per curiam), rejected the argument that aiding and abetting arson falls outside the generic definition of crime of violence under the Bail Reform Act of 1984, 18 U.S.C. § 3143(a)(2). And *United States* v. *Baca-Valenzuela*, 118 F.3d 1223, 1232-1233 (8th Cir. 1997), held that aiding and abetting possession of cocaine with the intent to distribute it categorically constitutes "illicit trafficking in any controlled substance" and thus an aggravated felony under the INA.

Nor do footnote six of *Penuliar* or *Martinez-Perez*, 417 F.3d at 1028, the case on which the footnote relied, provide the basis for a circuit split. Given the focus of the court on the "broad" nature of California aiding and abetting liability,[12] *Martinez-Perez* stands for the proposition that the scope of liability under California's grand theft statute exceeds the generic definition of "theft offense" because California aiding and abetting liability is particularly broad—not because the generic definition of theft does not include *any* liability for aiding and abetting at all. Footnote 6 in *Penuliar* reaches the same conclusion for California Vehicle Code § 10851(a).[13] And there is no circuit split on this issue: the cases cited by the Government concern the laws of different states and therefore do not address the scope of aiding and abetting liability under California law.

Yet even assuming, *arguendo*, that footnote six of *Penuliar* does create a split with other circuits (by holding that the generic definition does not include aiding and abetting liability), this split does not provide the basis for a grant of certiorari. The central holding of *Penuliar* is that accessory liability is beyond the scope of the generic definition of "theft offense"; any holding on aiding and abetting liability is, at most, an alternate holding. Thus, review of the aiding and abetting question the Government presents would not ad-

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[12] *Martinez-Perez* observed that "aiding and abetting liability in California 'is quite broad, extending even to promotion and instigation.'" 417 F.3d at 1027 (quoting *United States* v. *Corona-Sanchez*, 291 F.3d 1201, 1208-1209 (9th Cir. 2002)). Thus, the court found that "[b]ecause a defendant can be convicted of the substantive violation of § 487(c) based on an aiding and abetting theory alone, some of the conduct proscribed by § 487(c) falls outside the generic definition of theft offense." *Id.* at 1028.

[13] *Penuliar* also makes reference elsewhere in the opinion to "accomplice[s]," another term that appears in § 10851. 395 F.3d at 1044. While it is unclear why the court also quoted this term, it appears that it is mentioned because the term is listed with accessory liability within California Vehicle Code § 10851(a). Yet even assuming, *arguendo*, that this term is somehow related to the court's holding, the court's accompanying citation of *Martinez-Perez* suggests that, at most, the court was referring to the scope of accomplice liability under California law. *See id.*

dress the central holding of the case and will not affect the outcome. If the Court wishes to review the question presented, it should await a case in which that holding is dispositive.

III. THE NINTH CIRCUIT REACHED THE CORRECT RESULT IN THIS CASE AND IN *PENULIAR*

Supreme Court review in this case or *Penuliar* is unwarranted for the additional reason that the Ninth Circuit reached the correct result. Indeed, even if the Court accepts the Government's view of *Penuliar*, certiorari is not warranted because there is an alternate ground for affirmance. Specifically, California Vehicle Code § 10851(a) expressly reaches accessories after the fact, and accessories after the fact are beyond the reach of the generic definition of "theft offense." Thus, the Ninth Circuit properly concluded that § 10851(a) is not a categorical "theft offense" under the INA.

Under *Taylor*, the categorical inquiry is guided by the "generic definition" of "theft offense." The "generic definition" is meant to be "the generic sense in which the term is now used in the criminal codes of most States." 495 U.S. at 598; *see also* Pet. 6-7. A review of state criminal codes as well as the criminal title of the United States Code makes clear that the generic definition of "theft offense" does *not* reach accessories after the fact.

The criminal codes of all fifty states and the District of Columbia include statutory provisions that define those who are liable for an offense as principal. The Government cites these provisions as evidence that, as in California, "[t]he statutes of every other State (and the District of Columbia) likewise treat aiders and abettors as principals." Pet. 9. The very same statutes, however, do not explicitly include accessories after the fact within the scope of parties liable as principal for the underlying offense, nor do they reach the conduct of an accessory after the fact.[14] Indeed, every state but

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[14] *See* Ala. Code § 13A-2-23; Alaska Stat. § 11.16.110; Ariz. Rev. Stat. Ann. § 13-303; Ark. Code Ann. § 5-2-402; Colo. Rev. Stat. § 18-1-603; Conn.

one[15] addresses those considered at common law as accessories after the fact in entirely separate statutory provisions.[16]

Gen. Stat. Ann. § 53a-8; Del. Code Ann. tit. 11, § 271; D.C. Code § 22-1805; Fla. Stat. Ann. § 777.011; Ga. Code Ann. § 16-2-20; Haw. Rev. Stat. § 124A-112; Idaho Code Ann. § 19-1430; 720 Ill. Comp. Stat. Ann. 5/5-2; Ind. Code Ann. § 35-41-2-4; Iowa Code Ann. § 703.1; Kan. Stat. Ann. § 21-3205; Ky. Rev. Stat. Ann. § 502.020; La. Rev. Stat. Ann. § 14:24; Me. Rev. Stat. Ann. tit. 17-A, § 57; Md. Code Ann., Crim. Proc. § 4-204; Mass. Gen. Laws ch. 274, § 2; Mich. Comp. Laws Ann. § 767.39; Minn. Stat. Ann. § 609.05; Miss. Code Ann. § 97-1-3; Mo. Ann. Stat. § 562.041; Mont. Code Ann. § 45-2-302; Neb. Rev. Stat. Ann. § 28-206; Nev. Rev. Stat. Ann. § 195.020; N.H. Rev. Stat. Ann. § 626:8; N.J. Stat. Ann. § 2C:2-6; N.M. Stat. Ann. § 30-1-13; N.Y. Penal Law § 20.00; N.C. Gen. Stat. § 14-5.2; N.D. Cent. Code § 12.1-03-01; Ohio Rev. Code Ann. § 2923.03; Okla. Stat. Ann. tit. 21, § 172; Or. Rev. Stat. § 161.155; 18 Pa. Cons. Stat. Ann. § 306; R.I. Gen. Laws § 11-1-3; S.C. Code Ann. § 16-1-40; S.D. Codified Laws § 22-3-3; Tenn. Code Ann. § 39-11-402; Tex. Penal Code Ann. § 7.02; Utah Code Ann. § 76-2-202; Vt. Stat. Ann. tit. 13, § 3; Va. Code Ann. § 18.2-18; Wash. Rev. Code Ann. § 9A.08.020; W. Va. Code Ann. § 61-11-6; Wis. Stat. Ann. § 939.05; Wyo. Stat. Ann. § 6-1-201.

[15] West Virginia contrasts those parties liable as principal—all principals and accessories before the fact—with accessories after the fact, who may be "confined in jail not more than one year and fined not exceeding five hundred dollars," in the same provision. W. Va. Code Ann. § 61-11-6.

[16] Respondent sets forth the relevant state and District of Columbia statutes herein. Some states use the label "accessory after the fact," and some, like California, employ the term "accessory" to refer to accessories after the fact. In other states, the offense of accessory after the fact currently "is characterized as 'hindering' apprehension or prosecution, or is otherwise described to reflect its true character as a crime involving interference with the process of government." 2 LaFave § 13.6(a) (footnote omitted).

Ala. Code § 13A-10-42 (hindering prosecution or apprehension); Alaska Stat. § 11.56.770 (hindering prosecution); Ariz. Rev. Stat. Ann. § 13-2510 (hindering prosecution); Ark. Code § 5-54-105 (hindering apprehension or prosecution); Cal. Penal Code § 32 (accessories); Colo. Rev. Stat. § 18-8-105 (accessory to crime); Conn. Gen. Stat. Ann. § 53a-165 (hindering prosecution); Del. Code Ann. tit. 11, § 1244 (hindering prosecution); D.C. Code § 22-1806 (accessories after the fact); Fla. Stat. Ann. § 777.03 (accessory after the fact); Ga. Code Ann. § 16-10-50 (hindering the apprehension or punishment of a criminal); Haw. Rev. Stat. § 710-1028 (hindering prosecution); Idaho Code Ann. § 18-205 (accessories); 720 Ill. Comp. Stat. Ann. 5/31-4 (obstructing justice); Ind. Code Ann. § 35-44-3-2 (assist-

The approach in the statutes of all fifty states and the District of Columbia to those liable as principal, on the one hand, and to accessories after the fact, on the other, reflects the fact that accessories after the fact are not liable as principal for the underlying offense. Lest there be any doubt about this proposition, the case law in at least forty states

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ing a criminal); Iowa Code Ann. § 703.3 (accessory after the fact); Kan. Stat. Ann. § 21-3812 (aiding a felon); Ky. Rev. Stat. Ann. § 520.120 (hindering prosecution or apprehension); La. Rev. Stat. Ann. § 14:25 (accessories after the fact); Me. Rev. Stat. Ann. tit. 17-A, § 753 (hindering apprehension or prosecution); Md. Code Ann., Crim. Proc. § 1-301 (accessory after the fact); Mass. Gen. Laws ch. 274, § 4 (accessories after fact); Minn. Stat. Ann. § 609.495 (aiding an offender); Miss. Code Ann. § 97-1-5 (accessory after fact); Mo. Ann. Stat. § 575.020 (concealing an offense); *id.* § 575.030 (hindering prosecution); Mont. Code Ann. § 45-7-305 (compounding a felony); Neb. Rev. Stat. Ann. § 28-204 (accessory to felony); Nev. Rev. Stat. Ann. § 195.030 (accessories); N.H. Rev. Stat. Ann. § 642:3 (hindering apprehension or prosecution); N.J. Stat. Ann. § 2C:29-3 (hindering apprehension or prosecution); N.M. Stat. Ann. § 30-22-4 (harboring or aiding a felon); N.Y. Penal Law § 205-50 (hindering prosecution); N.C. Gen. Stat. § 14-7 (accessories after the fact); N.D. Cent. Code § 12.1-08-03 (hindering law enforcement); Ohio Rev. Code Ann. § 2921.32 (obstructing justice); Okla. Stat. Ann. tit. 21, § 173 (accessories); Or. Rev. Stat. § 162.325 (hindering prosecution); 18 Pa. Cons. Stat. Ann. § 5105 (hindering apprehension or prosecution); R.I. Gen. Laws § 11-1-4 (harboring criminal); S.C. Code Ann. § 16-1-55 (classification of accessory crimes); S.D. Codified Laws § 22-3-5 (accessories to crime); Tenn. Code Ann. § 39-11-411 (accessories after fact); Tex. Penal Code Ann. § 38.05 (hindering apprehension or prosecution); Utah Code Ann. § 76-8-306 (obstruction of justice in criminal investigations or proceedings); Vt. Stat. Ann. tit. 13, § 5 (accessory after the fact); Va. Code Ann. § 18.2-19 (how accessories after the fact punished); Wash. Rev. Code Ann. § 9A.76.050 (rendering criminal assistance); Wis. Stat. Ann. § 946.47 (harboring or aiding felons); Wyo. Stat. Ann. § 6-5-202 (accessory after the fact). Michigan apparently has neither an accessory statute nor some kind of obstruction statute that covers accessories after the fact. Rather, accessories after the fact may be charged under Michigan Compiled Laws Annotated § 750.505, a catch-all provision for crimes not expressly covered by statute. *See People* v. *Karst*, 324 N.W.2d 526, 529 (Mich. Ct. App. 1982) ("[A]n accessory after-the-fact may be charged under M.C.L. § 750.505.").

and the District of Columbia confirms this logical conclusion.[17]

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[17] *Washington* v. *State*, 562 So. 2d 281, 283 (Ala. Crim. App. 1990) ("The history of the offense of hindering prosecution in Alabama shows that the offense has been limited to persons other than principals."); *Thiel* v. *State*, 762 P.2d 478, 486 (Alaska Ct. App. 1988) (distinguishing accomplice liability from hindering prosecution and explaining that "[c]onduct which would give rise to liability as an accessory after the fact under existing law is classified as the crime of hindering prosecution under the Code" (quotation omitted)); *State* v. *Sims*, 409 P.2d 17, 21 (Ariz. 1965) (holding that a precursor to the present hindering prosecution statute "sets up a distinct, independent offense [from the offense of the principal] for which the punishment is prescribed in the subsequent section. Such a person is not subject to punishment and prosecution as a principal . . . ." (citation omitted)); *Hopes* v. *State*, 816 S.W.2d 167, 168 (Ark. 1991) ("[A] person who was formerly an accessory after the fact is now guilty of a separate crime—hindering apprehension and prosecution."); *People* v. *Cooper*, 811 P.2d 742, 750 (Cal. 1991) (distinguishing liability of principal and aider and abettor from that of accessory after the fact); *Martinez* v. *People*, 444 P.2d 641, 643 (Colo. 1968) (en banc) ("[I]t is not true that one can be indicted as principal whose conduct is such as to make of him . . . an 'accessory after the fact.'"); *State* v. *Avila*, 613 A.2d 731, 736 & n.9 (Conn. 1992) (observing that one who offers assistance with a crime after it has occurred cannot be liable for the underlying offense under Conn. Gen. Stat. Ann. § 53a-8, but may be charged under § 53a-165 with hindering prosecution); *Williams* v. *United States*, 478 A.2d 1101, 1106 n.5 (D.C. 1984) ("[The D.C.] Code does not equate an accessory after the fact to a principal and it provides a separate penalty for the crime of accessory after the fact."); *Bowen* v. *State*, 791 So. 2d 44, 50 (Fla. Dist. Ct. App. 2001) ("[T]he crime of accessory after the fact . . . is separate and distinct from the crime committed by the principal."); *State* v. *Freeman*, 537 S.E.2d 92, 94 (Ga. 2000) ("[A]n accessory after the fact is not considered an accomplice to the underlying crime itself but is guilty of a separate, substantive offense in the nature of an obstruction of justice. The definition of hindering the apprehension of a criminal eliminates the idea of participation by a person guilty of such an offense in the perpetration of the major crime." (quotation and footnote omitted)); *State* v. *Randles*, 787 P.2d 1152, 1155 (Idaho 1990) (distinguishing accessories after the fact from accomplices, aiders and abettors, and principals), *overruled on other grounds by State* v. *Humpherys*, 8 P.3d 652 (Idaho 2000); *People* v. *Clark*, 581 N.E.2d 722, 726 (Ill. App. Ct. 1991) ("[A]n accessory after the fact . . . could be at most charged with obstruction of justice; being an accessory after the fact is not a crime in Illinois."); *Myers* v. *State*, 765 N.E.2d 663, 666 (Ind. Ct. App. 2002) ("[T]he statute no longer makes the accessory after the fact guilty of

the same crime as the principal."); *State* v. *Hustead*, 538 N.W.2d 867, 870 (Iowa Ct. App. 1995) ("An accused may not be convicted as a principal on the theory of aiding and abetting for conduct that only supports an accessory after the fact."); *State* v. *Busse*, 847 P.2d 1304, 1305 (Kan. 1993) ("[Aiding a felon] is best understood in terms of the common-law crime of accessory after the fact.... Today, by statute, most jurisdictions define the crime of accessory after the fact as a separate, distinct crime carrying a lesser punishment [than that of the principal]."); *Cissell* v. *Commonwealth*, 419 S.W.2d 555, 557 (Ky. Ct. App. 1967) ("An accessory after the fact is not an accomplice or principal ...."); *State* v. *Peterson*, 290 So. 2d 307, 308 (La. 1974) ("That the accused is indicted for the offense itself, and not charged as an accessory after the fact, irrefutably evidences that he is charged as principal."); *Tharp* v. *State*, 742 A.2d 6, 13 (Md. Ct. Spec. App. 1999) ("[A]ccessoryship after the fact is a distinct offense, separate from the principal crime."); *Commonwealth* v. *Berryman*, 268 N.E.2d 354, 356 (Mass. 1971) ("[O]ne cannot be both a principal in a crime and an accessory after the fact of the same crime."); *Karst*, 324 N.W.2d at 529 ("[I]t is clear that an accessory after-the-fact is not an aider and abettor under M.C.L. § 767.39."); *State* v. *Swanson*, 707 N.W.2d 645, 652 (Minn. 2006) ("An accessory after the fact is not an accomplice."); *In Interest of J.P.C.* v. *State*, 783 So. 2d 778, 781 (Miss. Ct. App. 2000) ("[O]ne acting in such capacity [as accessory after the fact] is not considered a principal and may not be convicted and punished as such."); *Pelton* v. *State*, 794 S.W.2d 301, 303 (Mo. Ct. App. 1990) ("[Defendant] cannot be criminally liable for [the principal's] acts merely because he aided him after the completion of the crime. ... There are other, specific crimes for which an accessory after the fact may be liable, such as concealing an offense or hindering prosecution."); *State* v. *Nordahl*, 679 P.2d 241, 244 (Mont. 1984) ("One who 'aids' an offender *after* a crime has been committed would not be punished for that crime."); *Heyen* v. *State*, 210 N.W. 165, 167 (Neb. 1926) (labeling "accessory after the fact ... a different offense" from that of the principal); *State* v. *Sullivan*, 185 A.2d 410, 415 (N.J. Super. Ct. App. Div. 1962) ("An accessory after the fact cannot be charged, or punished as the principal offender." (quotation omitted)); *People* v. *Robinson*, 457 N.Y.S.2d 347, 349 (N.Y. Sup. Ct. 1982) ("He was an accessory after the fact who cannot be convicted as a principal because his intent was formed and his act done after the underlying crime had been completed." (citation omitted)); *State* v. *McIntosh*, 133 S.E.2d 652, 655 (N.C. 1963) (distinguishing the crime of accessory after the fact from the underlying offense and finding that accessory after the fact is "a substantive crime—not a lesser degree of the principal crime"); *State* v. *Shepard*, 277 N.W. 315, 320 (N.D. 1937) ("Being an accessory after the fact (if he had guilty knowledge) would not be sufficient to convict [the defendant] of the principal offense ...."); *State* v. *Parker*, No. 04 CO 44, 2005 WL 3489875, at *4 (Ohio Ct. App. Dec. 16, 2005) ("We also note that even an accessory after-the-fact or an obstructor

Federal statutes and case law reflect the same approach. Section 2 of Title 18 of the United States Code sets forth those liable as principal—a list that includes one who

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of justice under R.C. 2921.32 is not considered an alleged accomplice for purposes of R.C. 2923.03(D)."); *State* v. *Truesdell*, 620 P.2d 427, 428 (Okla. Crim. App. 1980) ("[A]ll parties to a crime are either principals or accessories after the fact. . . . Thus, the crime of accessory after the fact is a separate and distinct crime, standing on its own particular elements."); *State* v. *Stevenson*, 465 P.2d 720, 721-722 (Or. Ct. App. 1970) ("[T]he rule in Oregon and the majority rule throughout the country is that accessory after the fact is a distinct crime requiring an indictment separate from one charging participation as a principal."); *Commonwealth* v. *Spence*, 627 A.2d 1176, 1183 (Pa. 1993) ("An accessory after the fact is not an accomplice."); *State* v. *Collins*, 495 S.E.2d 202, 204-205 (S.C. 1998) (observing that a person present at a felony but not an aider and abettor would not "qualify" as a principal, but "may become" an accessory after the fact by aiding the principal's escape); *State* v. *Bradley*, 431 N.W.2d 317, 322 (S.D. 1988) ("On this record, [defendant] was, at most, an accessory after the fact: If a person after the commission of a felony, conceals or aids the offender with knowledge that he has committed a felony and with intent that he may avoid or escape from arrest, trial, conviction, or punishment, he is an accessory, but not an accomplice." (quotation omitted)); *Monts* v. *State*, 379 S.W.2d 34, 43 (Tenn. 1964) ("[A]n accessory after the fact is not subject to indictment for the offense committed by his principal; but rather he is guilty of a separate and distinct offense."); *Medrano* v. *State*, 658 S.W.2d 787, 791-792 (Tex. App. 1983) ("Accessory conduct is no longer recognized under Texas law as conduct making one a party. Such acts are now prohibited under Tex. Penal Code Ann. § 38.05 . . . which defines a separate and distinct crime of 'hindering apprehension or prosecution.'" (citation omitted)); *State* v. *Ervin*, 451 P.2d 372, 373 n.1 (Utah 1969) ("In this state all accessories are principals except accessory after the fact."); *State* v. *Burnett*, 225 P.2d 416, 418 (Wash. 1951) ("The trial court correctly charged the jury as to the meaning of 'aiding or abetting', as to the distinction between aiding or abetting and being an accessory after the fact, and that [defendant] was not guilty of the crime charged, even though he aided [the principal] in leaving the scene, if he, [defendant], had in no way participated in the attempted robbery." (citations omitted)); *State* v. *Rundle*, 500 N.W.2d 916, 925 (Wis. 1993) (quoting the first edition of LaFave's Substantive Criminal Law treatise for the proposition that "the accessory after the fact is not deemed a participant in the felony" and has "remained distinct" from the other categories); *Jahnke* v. *State*, 692 P.2d 911, 921 n.3 (Wyo. 1984) ("The statutory scheme of treating accessories after the fact as committing a separate offense and all other parties as principals has carried over into the revised Wyoming Criminal Code of 1982.").

"aids" and "abets" but does not include accessories after the fact in name or in substance. A separate section, entitled "accessory after the fact," addresses the liability and punishment of accessories after the fact and in no way suggests that accessories after the fact are also within the purview of § 2. 18 U.S.C. § 3. And this Court has confirmed that accessories after the fact are not liable as principals: "While § 332 [now § 2] of the Criminal Code . . . made aiders and abettors of an offense principals, Congress has not made accessories after the fact principals." *Bollenbach* v. *United States*, 326 U.S. 607, 611 (1946).[18] Rather than being liable for the underlying offense of the principal, "[t]heir offense is distinct and is differently punished." *Id.*

Additionally, the theft statutes of the fifty states and the District of Columbia in no way suggest that an accessory after the fact should be liable as principal for the underlying theft.[19] Specifically, in describing the general theft offense (or comparable offense in the absence of a general theft offense), the state statutes neither reach accessories after the fact explicitly nor appear to cover the conduct of one who acts only after the commission of the crime.[20]

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[18] *See also United States* v. *Varelli*, 407 F.2d 735, 749 (7th Cir. 1969) (holding that the defendants were "accessories after the fact and cannot be made principals under [18 U.S.C.] § 2").

[19] Although respondent has not assessed every federal theft-related offense, several basic federal theft-related laws likewise do not reference accessories after the fact or reach the conduct of an accessory after the fact. *See, e.g.*, 18 U.S.C. § 641 (theft of government money, property, and records statute, including no reference to accessories after the fact and not covering conduct of an accessory after the fact).

[20] The code provisions are for the general theft offense except as noted. Ala. Code § 13A-8-2 (theft of property); Alaska Stat. § 11.46.100; Ariz. Rev. Stat. Ann. § 13-1802; Ark. Code Ann. § 5-36-103 (theft of property); Cal. Penal Code § 484; Colo. Rev. Stat. § 18-4-401; Conn. Gen. Stat. Ann. § 53a-119 (larceny); Del. Code Ann. tit. 11, § 841; D.C. Code § 22-3211; Fla. Stat. Ann. § 812.014; Ga. Code Ann. § 16-8-2 (theft by taking); Haw. Rev. Stat. § 708-830; Idaho Code Ann. § 18-2403; 720 Ill. Comp. Stat. Ann. 5/16-1; Ind. Code Ann. § 35-43-4-2; Iowa Code Ann. § 714.1; Kan. Stat. Ann. § 21-3701; Ky. Rev. Stat. Ann. § 514.030 (theft by unlawful tak-

Indeed, the Government's own logic supports respondent's argument. The Government asserts that all state criminal codes include aiding and abetting in the definition of theft. Pet. 7. This argument—unsupported by any citations—appears mainly to be a logical outgrowth of the statutes defining who may be liable as principal.[21] The same logic, however, leads to the parallel conclusion that accessories after the fact are *not* liable for the underlying theft.[22]

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ing or disposition); La. Rev. Stat. Ann. § 14:67; Me. Rev. Stat. Ann. tit. 17-A, § 353 (theft by unauthorized taking or transfer); Md. Code Ann., Crim. Law § 7-104; Mass. Gen. Laws ch. 266, § 30 (larceny); Mich. Comp. Laws Ann. § 750.356 (larceny); Minn. Stat. Ann. § 609.52; Miss. Code Ann. § 97-17-41 (grand larceny); Mo. Ann. Stat. § 570.030 (stealing); Mont. Code Ann. § 45-6-301; Neb. Rev. Stat. Ann. § 28-511 (theft by unlawful taking or disposition); Nev. Rev. Stat. Ann. § 205.0832; N.H. Rev. Stat. Ann. § 637:3 (theft by unauthorized taking or transfer); N.J. Stat. Ann. § 2C:20-3 (theft by unlawful taking or disposition); N.M. Stat. Ann. § 30-16-1 (larceny); N.Y. Penal Law § 155.05 (larceny); N.C. Gen. Stat. § 14-72 (larceny of property); N.D. Cent. Code § 12.1-23-02 (theft of property); Ohio Rev. Code Ann. § 2913.02; Okla. Stat. Ann. tit. 21, § 1701 (larceny); Or. Rev. Stat. § 164.015; 18 Pa. Cons. Stat. Ann. § 3921 (theft by unlawful taking or disposition); R.I. Gen. Laws § 11-41-1 (stealing as larceny); S.C. Code Ann. § 16-13-30 (petit larceny; grand larceny); S.D. Codified Laws § 22-30A-1; Tenn. Code Ann. § 39-14-103 (theft of property); Tex. Penal Code Ann. § 31.03; Utah Code Ann. § 76-6-404; Vt. Stat. Ann. tit. 13, § 2501 (grand larceny); Va. Code Ann. § 18.2-95 (grand larceny); Wash. Rev. Code Ann. § 9A.56.020; W. Va. Code Ann. § 61-3-13 (grand and petit larceny distinguished); Wis. Stat. Ann. § 943.20; Wyo. Stat. Ann. § 6-3-403 (wrongful taking or disposing or property).

[21] The Government similarly asserts, again without any supporting authority, that "every substantive criminal offense" covers aiding and abetting. Pet. 7. Respondent does not purport to have reviewed the underlying statutes of "every substantive criminal offense." But, again, the distinct status of accessories after the fact supports the proposition that, with the exception of statutes expressly covering accessories after the fact, such as California Vehicle Code § 10851(a), substantive criminal offenses do not reach accessories after the fact.

[22] As noted at the outset, the INA includes "receipt of stolen property" as a "theft offense." 8 U.S.C. § 1101(a)(43)(G). And state laws do impose criminal liability for the receipt of stolen property. *See, e.g.*, Ark. Code Ann. § 5-36-106 (theft by receiving). Such statutes do not alter the analysis—they do not suggest that California Vehicle Code § 10851(a) falls

Furthermore, the BIA has recognized the distinction in the offense conduct and liability of accessories after the fact and principals. In *Matter of Batista-Hernandez*, 21 I. & N. Dec. 955, 960 (BIA 1997), the BIA held that a conviction for accessory after the fact for assisting a drug trafficker "insufficiently relates to [the principal's] underlying drug-trafficking crime" to support a finding of deportability. As the BIA explained:

> While courts treat a person who aids and abets others as an additional party to the substantive crime, one who is an accessory after the fact, like an individual guilty of misprision, has been found to have committed a separate and distinct crime from the substantive offense committed by the principal.

Id. at 959.[23]

Because under the laws of the fifty states, the District of Columbia, and the federal government, accessories after the fact are neither treated as principals nor covered by the theft statutes, the generic definition of "theft offense" can-

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within the generic definition of "theft offense." As an initial matter, one who receives stolen goods is not necessarily an accessory after the fact. *See* 2 LaFave § 13.6(a) ("Because aid must be to the felon personally, one does not become an accessory after the fact by, for example, receiving and concealing what are known to be stolen goods." (citing cases)). Moreover, accessories after the fact to the theft need not receive stolen goods. For example, if the principal happens upon another when making his escape, and that other individual assists the principal in evading the police, the individual would be an accessory after the fact even if he was not given the fruits of the crime. Accordingly, the inclusion of receipt of stolen property within "theft offense" does not bring accessory after the fact liability under § 10851(a) within the scope of the generic definition.

[23] *Batista-Hernandez* went on to hold that the respondent was deportable because the conviction under 18 U.S.C. § 3 qualified as an "offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year" and thus an aggravated felony under § 101(a)(43)(S) of the INA, 8 U.S.C. § 1101(a)(43)(S). 21 I. & N. Dec. at 961. The question whether respondent's conviction under California Vehicle Code § 10851(a) falls within the scope of § 1101(a)(43)(S) is not before the Court.

not be deemed to reach accessories after the fact. In turn, because the California statute at issue here, California Vehicle Code § 10851(a), reaches accessories after the fact, this statute covers conduct not encompassed within the generic definition of "theft offense." Accordingly, the ultimate holding in *Penuliar* is correct—§ 10851(a) does not qualify as a categorical "theft offense" under the INA.

IV. THIS COURT SHOULD DENY THE PETITION FOR A WRIT OF CERTIORARI IN LIGHT OF THE NINTH CIRCUIT'S EN BANC REVIEW IN *VIDAL*

Even if this Court shares the Government's approach to and views of the issues in this case and *Penuliar*, certiorari is not warranted in light of the Ninth Circuit's decision—issued after the Government submitted its petitions for writs of certiorari in this case and *Penuliar*—to review en banc the panel decision in *Vidal*.[24]

A. *Vidal* Addresses The Scope Of California Vehicle Code § 10851(a)

The legal issues of *Vidal*, the instant case, and *Penuliar* are closely related. All three cases involve the interpreta-

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[24] The Government goes on at length (Pet. 15-21) regarding the "substantial effect on the administration of the immigration laws" that the decision in *Penuliar* will have if left unreviewed. The Government notes that the Ninth Circuit has remanded several cases in light of *Penuliar*. Pet. 16. The remainder of the Government's arguments, however, vary from the highly speculative to the highly unlikely. It hints that no alien convicted of a theft offense will ever be deported because the Government will not be able to show a conviction of a theft offense under the modified approach. Pet. 18. Then it suggests that the Ninth Circuit "may well" extend its holding to crimes of moral turpitude and, indeed, to "every crime that is a basis for removal." Pet. 20. These arguments reflect a fair amount of creativity as well as the Government's misunderstanding of the decision in *Penuliar*. *Penuliar*'s "logical" conclusion extends only so far as statutes that include liability for accessories after the fact—an extension that is both logical and correct, for the reasons stated above. In any event, the actual and imagined consequences will depend in large part on the outcome in *Vidal*; that case may remedy or avoid the concerns of the Government.

tion of the same California statute—California Vehicle Code § 10851(a). All three cases involve the application of the *Taylor* framework to determine whether a conviction under this statute constitutes a "theft offense." And while *Vidal* raises this question in the context of the Sentencing Guidelines rather than the INA, the issues addressed in the cases overlap in substantial part.

The question in *Vidal* was whether Vidal's conviction under § 10851(a) was a "theft offense" that would justify a sentence enhancement as an "aggravated felony" under U.S.S.G § 2L.1(b)(1)(C). 426 F.3d at 1014. With respect to the first step of the *Taylor* framework, Vidal contended that § 10851 is overly broad because it covers convictions based on aiding and abetting liability.[25] The Ninth Circuit rejected this view, citing the 2001 amendments to the Guidelines. *Id.* at 1015. The Application Note states that "[p]rior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiring, and attempting, to commit such offenses." U.S.S.G. § 2L1.2, cmt. n.4 (2002). And the court found that "this commentary governs Vidal's sentence." 426 F.3d at 1015. The Ninth Circuit distinguished *Penuliar*, which Vidal had relied upon for support, on the ground that it did not consider the commentary to U.S.S.G. § 2L1.2.[26] *See id.*

The court declined to address Vidal's argument that "aiding and abetting liability for federal sentencing purposes does not cover accessories to criminal conduct who act after

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[25] Vidal also argued that the state statute covered intent to make a temporary or de minimis deprivation while the Model Penal Code approach requires a permanent or extended deprivation. The court rejected that view of the generic definition, noting that it has adopted the Seventh Circuit's definition of "theft offense," which includes deprivations "less than total or permanent." 426 F.3d at 1014 (quotation omitted).

[26] The court also rejected Vidal's argument that "California aiding and abetting liability is broader than federal aiding and abetting liability." 426 F.3d at 1015. In the court's view, "California aiding and abetting liability requires proof of all elements contained in the federal definition." *Id.* at 1016.

the commission of the prohibited act." 426 F.3d at 1016. The court held that this "point is neither developed, nor would it make any difference in this case because ... Vidal pled guilty to *taking* the car." *Id.* (emphasis in original). The court thus concluded that conviction under California Vehicle Code § 10851(a) did constitute a "theft offense" and that, regardless, Vidal's conviction plainly qualified under the modified categorical approach. *See id.* at 1017.

As noted above, *supra* Part I.B, Judge Browning dissented on the ground that the court "fails to address adequately" Vidal's argument that § 10851(a) is broader than the generic definition of theft offense because it criminalizes accessories, and "in doing so reaches an erroneous conclusion." 426 F.3d at 1018 (Browning, J., concurring in part and dissenting in part). Specifically, Judge Browning found that California retained the distinction between accessories after the fact and principals, that § 10851(a) reaches accessories after the fact, and that the Sentencing Guidelines and accompanying commentary did not address accessories after the fact. Thus, he concluded, § 10851(a) reaches beyond the generic definition of "theft offense" and is not a categorical aggravated felony under the Guidelines.

Vidal sought panel rehearing and rehearing en banc. The Ninth Circuit granted en banc review on June 26, 2006, and oral argument will be held on October 5, 2006.

B. En Banc Review In *Vidal* Renders Supreme Court Review Premature

En banc review in *Vidal* will entail reconsideration of the scope of § 10851(a) relative to the generic definition of "theft offense." The majority and dissenting opinions in *Vidal* reveal two sorts of disagreements, both of which the en banc court will have an opportunity to reconcile. First, the *Vidal* opinions reflect disagreement on the underlying question whether § 10851(a) is a categorical "theft offense." Second, the opinions' use of precedent suggests conflicting views about the import of Ninth Circuit case law, including *Penuliar*, on this issue.

As relevant to *Penuliar* and this case, the en banc court appears primed to consider the importance of California Vehicle Code's § 10851(a)'s inclusion of accessory liability as well as the scope of aiding and abetting liability under California law. And the court likewise appears ready to address the question presented by the Government—whether the generic definition reaches aiding and abetting.[27]

The disagreement within the *Vidal* panel as well as the grant of en banc review suggest that the Ninth Circuit has not yet come to rest on the interpretation and breadth of § 10851(a). In such circumstances, Supreme Court review would be premature; the Ninth Circuit is in the process of considering and reconsidering the issues at stake in *Vidal*, *Penuliar*, and the instant case.[28]

CONCLUSION

This Court should deny the petition for writ of certiorari.

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[27] Although the aiding and abetting question arises in context of the Sentencing Guidelines in *Vidal*, an en banc decision in *Vidal* may well offer guidance for cases addressing the aiding and abetting question under the INA. Even if the en banc court's holding with respect to aiding and abetting liability is tied to the Sentencing Guidelines and has no bearing on cases addressing the INA, the court seems likely to address the other issues that offer alternate grounds for affirmance in this case and would not be tied to the Sentencing Guidelines.

[28] Finally, as the Government notes (Pet. 21-22) Congress has been considering legislation that would explicitly include liability for aiding and abetting within the definition of "aggravated felony." *See* Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong., § 201(a)(3) (passed Dec. 16, 2005); Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong., § 203(a)(5) (passed May 25, 2006). Thus, any confusion in the courts over the question of interest to the Government may be cleared up through the legislative process, suggesting another reason that this case does not warrant certiorari.

Respectfully submitted,

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AUGUST 2006

SEP 6 - 2006

(3)

No. 05-1629

In the Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
PETITIONER

v.

LUIS ALEXANDER DUENAS-ALVAREZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

In the decision below, the Ninth Circuit applied its holding in *Penuliar* v. *Gonzales*, 435 F.3d 961, 970 n.6 (2006), petition for cert. pending, No. 05-1630 (filed June 22, 2006), that "aiding and abetting liability is [not] included in the generic definition of a 'theft offense'" under the "aggravated felony" provision of the Immigration and Nationality Act (INA), 8 U.S.C. 1101(a)(43)(G). As the petition demonstrates (at 6-25), that holding is incorrect; it conflicts with decisions of other courts of appeals; and, if left unreviewed, it will have a substantial effect on the administration of the immigration laws.[1] Respondent does not seriously dispute any of those propositions. Instead, he contends (Br. in Opp. 8-17) that the issue raised in the petition is not presented in this case, because the decision below did not rest on the ground that "theft offense" excludes aiding and abetting; he contends (*id.* at 17-26) that, even if the decision did rest on that ground, a ruling in the government's favor would not change the outcome, because California Vehicle Code § 10851(a) (West 2000) imposes liability on accessories after the fact, who are not covered by the generic definition of "theft offense"; and he contends (Br. in Opp. 28-29) that it would in any event be premature for the Court to grant certiorari, because the Ninth Circuit recently granted rehearing en banc in *United States* v. *Vidal*, 426 F.3d 1011 (2005), rehearing granted, 453 F.3d 1114 (2006), which presents the question whether a violation of Section 10851(a) is a "theft offense" under the Sentencing Guidelines. Each of those contentions is without merit.

[1] Since the petition was filed, the Fifth Circuit has held that aiding and abetting bank fraud is an aggravated felony under 8 U.S.C. 1101(a)(43)(M)(i), which covers offenses that "involve[] fraud or deceit in which the loss to the victim or victims exceeds $10,000." *James* v. *Gonzales*, No. 04-60445, 2006 WL 2536614, at *2-*3 (Sept. 5, 2006).

A. The Question Presented In The Petition Is Squarely Presented In This Case

Relying on the fact that California Vehicle Code § 10851(a) includes the term "accessory" and that "accessory" as used in California Penal Code § 32 (West 1999) is an accessory after the fact (which is distinct from an aider and abettor), respondent interprets *Penuliar* as holding that Section 10851(a) is broader than the generic definition of "theft offense," not because "aiding and abetting liability is not included in the generic definition," but because Section 10851(a) "reaches accessories after the fact." Br. in Opp. 6-7. As a consequence, according to respondent, the question presented in the petition "does not * * * pertain to the holding in *Penuliar*." *Id.* at 14. Respondent is mistaken, because his description of the rationale for *Penuliar*'s holding is inaccurate. The decision in that case (and therefore in this one) rested squarely on the ground that Section 10851(a) covers aiding and abetting.

In holding that a violation of Section 10851(a) is not categorically a "theft offense" in *Penuliar*, the Ninth Circuit explained that it had held in *United States* v. *Corona-Sanchez*, 291 F.3d 1201 (2002) (en banc), that "a conviction under California's general theft statute, California Penal Code § 484(a), was not a categorical 'theft offense'" in part because "a defendant can be convicted of the substantive offense for aiding and abetting a theft." *Penuliar*, 435 F.3d at 969. The court went on to say that it had "recently applied this same reasoning" in *Martinez-Perez* v. *Gonzales*, 417 F.3d 1022 (2005), which held that "a grand theft conviction under California Penal Code § 487(c) did not categorically constitute a theft offense" because "a defendant can be convicted of a substantive violation of § 487(c) based on an aiding and abetting theory alone." *Penuliar*, 435 F.3d at 969 (quoting *Martinez-Perez*, 417 F.3d at 1028). The court then held that "[a] conviction under California's vehicle theft statute is broader than

the generic definition of a 'theft offense' * * * *for the same reason*," and quoted a California decision for the proposition that Section 10851(a) permits a conviction if the defendant "aided or assisted" in the driving with the requisite state of mind. *Id.* at 969-970 (emphasis added) (quoting *People* v. *Clark*, 251 Cal. App. 2d 868, 874 (1967)). In so holding, the court rejected the contention raised in the government's rehearing petition that "aiding and abetting liability is included in the generic definition of a 'theft offense,'" finding it foreclosed by *Martinez-Perez*. *Id.* at 970 n.6. Nowhere in its decision in *Penuliar* did the Ninth Circuit rely upon, address, or even mention the theory advanced in respondent's brief in opposition.[2]

B. Resolving The Question Presented In The Government's Favor Would Change The Outcome Of The Case

In the alternative, respondent contends that certiorari should be denied even if *Penuliar* did rely on the fact that Section 10851(a) reaches aiding and abetting, because the Ninth Circuit's ultimate decision—that a violation of the statute is not categorically a "theft offense"—is still correct. Br. in Opp. 7, 17-26. That is so, according to respondent, because Section 10851(a) includes

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[2] Respondent is mistaken in his contention that the Ninth Circuit "did not discuss aiding and abetting liability" in its initial opinion in *Penuliar*. Br. in Opp. 9. Like the amended opinion, the initial opinion explicitly held that Section 10851(a) is broader than the generic definition "for the same reason" that was applicable to the theft statutes at issue in *Corona-Sanchez* and *Martinez-Perez*—namely, that it covers aiding and abetting. *Penuliar* v. *Ashcroft*, 395 F.3d 1037, 1044 (2005), amended, 435 F.3d 961 (2006), petition for cert. pending, No. 05-1630 (filed June 22, 2006). Respondent is also mistaken in his contention that the inclusion of a response to the government's rehearing petition in the amended opinion "reinforces the conclusion that the holding does not pertain to aiding and abetting liability." Br. in Opp. 9. On the contrary, if the ground for the decision in *Penuliar* were what respondent says it was, the most obvious response to the rehearing petition would have been that it is *irrelevant* whether the generic definition of "theft offense" includes aiding and abetting (not that the definition does *not* include aiding and abetting).

the term "accessory," an "accessory" under California Penal Code § 32 is an accessory after the fact, and an accessory after the fact to a theft has not committed a generic "theft offense." *Ibid.* As a consequence, respondent argues, there is "an alternate ground for affirmance" even if the government's reading of *Penuliar* is correct. *Id.* at 7, 17. Respondent did not make that argument in his briefs to the Board of Immigration Appeals and the court of appeals, and it is therefore not properly before this Court. In any event, the argument is mistaken.

1. As an initial matter, while it is true that "accessory" as used in California Penal Code § 32 is an accessory after the fact, it is not clear that Section 10851(a) reaches accessories after the fact. California Penal Code § 32 appears to set forth an offense *(i.e.*, a proscription of certain conduct), rather than defining a term ("accessory") for purposes of giving meaning to that term where it appears elsewhere in California statutes. Support for that view is found both in the language of Section 32 itself[3] and in the fact that the very next section of the Penal Code describes the penalties for the offense of being an accessory, see Cal. Penal Code § 33 (West 1999).

Even if Section 32 defines a *term*, however, respondent cites no case holding that "accessory" in Section 10851(a) of the *Vehicle Code* has the same meaning it has in Section 32 of the *Penal Code*. That conclusion is in fact undermined by a comparison of the texts of the two provisions. Section 32 of the Penal Code describes conduct after completion of the felony that is intended to conceal the crime or enable the principal to avoid punishment (see note 3, *supra*), while Section 10851(a) of the Vehicle Code

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[3] Section 32 provides that

[e]very person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony.

describes conduct involved in the commission of the offense itself (being "a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing" of a vehicle). Indeed, the very California decision on which the Ninth Circuit relied in *Penuliar* for the proposition that Section 10851(a) reaches aiders and abettors, see 435 F.3d at 970, suggests that it does not reach accessories after the fact. Instead, that case suggests that the statutory phrase "any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing" is merely shorthand for aider and abettor. See *Clark*, 251 Cal. App. 2d at 874 (to convict a defendant on the theory that he was "a party or [an] accessory to or an accomplice in the driving," it must be shown that the defendant "aided or assisted" in the driving with the requisite state of mind).

2. Even if Section 10851(a) reaches accessories after the fact, and even if the statute is therefore broader than the generic definition of "theft offense" in the INA, a holding by this Court that the generic definition includes aiding and abetting will still change the outcome of the case. If this Court were to hold that the California statute covers accessories after the fact, all that would follow is that a violation of the statute is not a "theft offense" as a "categorical" matter. It would not follow that respondent's offense is not a "theft offense" under the "modified categorical" approach.

In *Penuliar*, as in this case, the alien was charged with violating Section 10851 as a principal.[4] Applying the "modified cate-

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[4] Penuliar was charged with

> unlawfully driv[ing] and tak[ing] a certain vehicle, to wit, 1994 FORD ESCORT, LICENSE # 3GUM326, then and there the personal property of MARHVIN ATIENZA without the consent of and with intent, either permanently or temporarily, to deprive the said owner of title to and possession of said vehicle.

435 F.3d at 971 n.8. A second charge against Penuliar was "identical in its language, except that it list[ed] a different car, license number, and owner."

gorical" approach, the Ninth Circuit held that the charging instruments were nevertheless "insufficient to unequivocally demonstrate that [the alien] actually *pled guilty* to activity of a principal," because "under California law an accusatory pleading against an aider or abettor may be drafted in an identical form as an accusatory pleading against a principal." *Penuliar*, 435 F.3d at 971 (emphasis added). The same is not true, however, of an accusatory pleading against an accessory after the fact. "[W]hile it is now generally accepted that a defendant may be charged as if a principal and convicted on proof that he aided another, a conviction as an accessory after the fact cannot be sustained upon an indictment charging the principal crime." 2 Wayne R. LaFave, *Substantive Criminal Law* § 13.6, at 405 (2d ed. 2003) (footnote omitted).[5] The reason for the distinction is that, as respondent recognizes, accessories after the fact "are not liable, as aiders and abettors are, for the underlying offense of the principal." Br. in Opp. 12; see *id.* at 20 n.17 (citing cases).

Accordingly, even if Section 10851(a) covers accessories after the fact, a defendant charged with violating the statute as a prin-

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Ibid. For his part, respondent was charged with

> willfully and unlawfully driv[ing] or tak[ing] a certain vehicle, to wit: 1992 Honda Accord, California license number 3JHJ638,[] then and there the personal property of Deborah and Michael Wood, * * * without the consent of and with the intent to permanently or temporarily deprive the said owner of title to and possession of said vehicle.

Pet. App. 13a.

[5] That is the law in California. See, *e.g.*, *People* v. *Prado*, 67 Cal. App. 3d 267, 271 (1977) ("a person charged in an indictment as principal cannot be convicted on evidence showing him to be only an accessory after the fact") (quoting 1 Francis Wharton, *Wharton's Criminal Law* § 285, at 373 (12th ed. 1932)); *People* v. *Baker*, 330 P.2d 240, 245 (Cal. Ct. App. 1958) (defendant "was charged and prosecuted as a principal" and therefore "could not have been convicted as an accessory"), cert. denied, 359 U.S. 956 and 361 U.S. 851 (1959); 17 Cal. Jur. 3d *Criminal Law: Core Aspects* § 124, at 192 (2002) ("one charged as a principal cannot be convicted on proof that he or she was an accessory").

cipal has necessarily *not* been convicted as an accessory after the fact, and therefore *has* been convicted of a "theft offense" under the "modified categorical" approach—unless the generic definition excludes aiding and abetting. Because *Penuliar* holds that the generic definition of "theft offense" *does* exclude aiding and abetting, a contrary holding by this Court on that issue will change the outcome of this case, as well as that of the many others in which the alien was charged with violating Section 10851(a) as a principal. Indeed, if the generic definition of "theft offense" includes aiding and abetting, it makes little practical difference whether the government is required to meet its burden under the "categorical" or the "modified categorical" approach, because, in the vast majority of cases of this type, the same documents that establish the fact of conviction—the charging instrument and corresponding judgment—also establish that the alien was convicted as a principal or an aider and abettor.

3. In any event, the rule challenged by the government—that the generic definition of "theft offense" excludes aiding and abetting—is not limited to cases involving a violation of Section 10851(a). The Ninth Circuit has applied the rule to California theft statutes that do not include the term "accessory." See *Corona-Sanchez*, 291 F.3d at 1207-1208 (general theft under California Penal Code § 484(a) (West 1999)); *Martinez-Perez*, 417 F.3d at 1027-1028 (grand theft under California Penal Code § 487(c) (West 1999)). Accordingly, even if respondent is correct about the significance of that term in Section 10851(a), the exclusion of accessory-after-the-fact liability from the generic definition of "theft offense" could not provide an alternative basis for holding that an alien charged with violating a *different* theft statute in California (or any other State) has not been convicted of a

"theft offense" under either the "modified categorical" *or* the "categorical" approach.[6]

C. The Question Presented Is Ripe For This Court's Review

Respondent contends that it would in any event be premature for this Court to grant certiorari, because the Ninth Circuit recently granted rehearing en banc in *Vidal*, *supra*. Respondent is again mistaken.

Contrary to respondent's contention, the Ninth Circuit does not "appear[] ready" in *Vidal* "to address the question presented by the Government" in this case. Br. in Opp. 29. *Vidal* involves the question whether a violation of Section 10851(a) is a "theft offense" under Section 2L1.2 of the Sentencing Guidelines. That guideline, unlike the INA provision at issue here, explicitly includes aiding and abetting in the definition. See Sentencing Guidelines § 2L1.2, comment. (n.5). The three-judge panel in *Vidal* unanimously distinguished *Penuliar* on that ground, see 426 F.3d at 1015; *id.* at 1018 (Browning, J., concurring in part), and the question presented in this case is not one of the questions presented in the petition for rehearing en banc in *Vidal*, see 04-50185 Pet. for Reh'g & Suggestion for Reh'g En Banc at 2-17. The Ninth Circuit has already denied rehearing en banc on that question, moreover, in *Penuliar* itself. 435 F.3d at 964.

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[6] Respondent contends that *Martinez-Perez* held that California's grand-theft statute is broader than the generic definition of "theft offense," not because "the generic definition of theft does not include *any* liability for aiding and abetting," but because "California aiding and abetting liability is particularly broad." Br. in Opp. 16. That is not correct. The Ninth Circuit has held that aiding and abetting is not part of the generic definition because one can aid and abet a theft without engaging in what that court considers an essential element of a generic "theft offense": "a taking of property or an exercise of control over property." *Martinez-Perez*, 417 F.3d at 1027 (quoting *Corona-Sanchez*, 291 F.3d at 1205). That would be true under *any* definition of aiding and abetting, which necessarily encompasses "assist[ing] or facilitat[ing] the commission of a crime." *Black's Law Dictionary* 76 (8th ed. 2004).

Respondent correctly points out (Br. in Opp. 8, 29) that the Ninth Circuit may decide in *Vidal* whether a violation of Section 10851(a) is not categorically a "theft offense" under the Guidelines because the statute includes the term "accessory" and the Guidelines do not explicitly cover accessory-after-the-fact liability. See 04-50185 Pet. for Reh'g & Suggestion for Reh'g En Banc at 2, 5-7. A decision in favor of the defendant on that issue, however, would have no effect on the issue in this case. As explained above (at 5-8), even if the inclusion of "accessory" in Section 10851(a) means that a violation of that statute is not categorically a "theft offense," an alien charged *as a principal* has been convicted of a "theft offense" under the "modified categorical" approach if "theft offense" includes aiding and abetting and, in any event, the Ninth Circuit has applied the rule challenged here to statutes that do not include the term "accessory."

There are a number of other issues raised in the rehearing petition in *Vidal*.[7] But it is not clear which, if any, of those issues the en banc court will address. Moreover, none of the other issues affects the question presented in this case—whether "theft offense" under the INA includes aiding and abetting—and it is not clear how, if at all, the Ninth Circuit's decision on any of them would affect the ultimate disposition of this case in any other respect. Those other issues, therefore, provide no basis for postponing resolution of the question presented in this case. Further delay would be particularly unwarranted because of the large number of immigration cases affected by the Ninth Circuit's rule that "theft offense" in 8 U.S.C. 1101(a)(43)(G) altogether ex-

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[7] They are: whether aiding and abetting under California law is broader than "generic" aiding and abetting (04-50185 Pet. for Reh'g & Suggestion for Reh'g En Banc at 2-3, 8-13); whether the generic definition of "theft offense" includes temporary or *de minimis* deprivations of property (*id.* at 3-4, 13-15); and whether a defendant can be deemed to have been convicted of a "theft offense" under the "modified categorical" approach when the charging instrument merely tracks the language of the statute (*id.* at 4-5, 16-17).

cludes aiding and abetting, see Pet. 15-21; because that rule is clearly erroneous and conflicts with the rule applied in other circuits; and because there is likely to come a point in the near future at which the issue no longer reaches the Ninth Circuit, inasmuch as the Board of Immigration Appeals is bound by that court's decisions in cases arising there, see, *e.g.*, *In re Anselmo*, 20 I. & N. Dec. 25, 31-32 (B.I.A. 1989).[8]

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

SEPTEMBER 2006

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[8] The petition notes (at 21-22) that the pending immigration-reform bills would amend 8 U.S.C. 1101(a)(43)(U) explicitly to include aiding and abetting but that no conference committee has even been appointed to reconcile the bills, which differ in significant respects. As of the date of the filing of this reply brief, it is still the case that no conference committee has been convened, and thus it remains uncertain whether legislation addressing the question presented in this case will be passed. Contrary to respondent's contention (Br. in Opp. 29 n.28), therefore, the pendency of those bills provides no basis for denying certiorari.

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Supreme Court, U.S.
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No. 05-1629

In the Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
PETITIONER

v.

LUIS ALEXANDER DUENAS-ALVAREZ

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether a "theft offense," which is an "aggravated felony" under the Immigration and Nationality Act, 8 U.S.C. 1101(a)(43)(G), includes aiding and abetting the commission of the offense.

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In the Supreme Court of the United States

No. 05-1629

ALBERTO R. GONZALES, ATTORNEY GENERAL, PETITIONER

v.

LUIS ALEXANDER DUENAS-ALVAREZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not published in the *Federal Reporter* but is reprinted in 176 Fed. Appx. 820. The decisions of the Board of Immigration Appeals (Pet. App. 3a) and the immigration judge (Pet. App. 4a-10a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 2006. The petition for a writ of certiorari was filed on June 22, 2006, and was granted on September 26, 2006. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 101(a)(43)(G) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(43)(G), defines "aggravated felony" to include "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year."

2. Section 10851(a) of the California Vehicle Code provides, in pertinent part, as follows:

> Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense.

Cal. Veh. Code § 10851(a) (West 2000).

STATEMENT

1. Under Section 237(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1227(a) (2000 & Supp. IV 2004), several classes of aliens are subject to removal from the United States, including those who have been convicted of certain categories of offenses after admission, 8 U.S.C. 1227(a)(2). Aggravated felonies comprise one such category. 8 U.S.C. 1227(a)(2)(A)(iii). The INA includes a long list of offenses that qualify as an aggravated felony, 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004), one of which is "a theft offense (including receipt of stolen property) * * * for which the term of imprisonment [is] at least one year," 8 U.S.C. 1101(a)(43)(G).

In deciding whether a particular offense constitutes a "theft offense" under the INA, courts have applied the same two-step test that this Court established in *Taylor* v. *United States*, 495 U.S. 575, 599-602 (1990), for deciding whether an offense is a "burglary" under the Armed Career Criminal Act of 1984 (ACCA), Pub. L. No. 98-473, Tit. II, ch. XVIII, 98 Stat. 2185 (repealed 1986), 18 U.S.C. App. 1202 (recodified at 18 U.S.C. 924(e) (2000 & Supp. IV 2004)).[1] See, *e.g.*, *Soliman* v. *Gonzales*, 419 F.3d 276, 284 (4th Cir. 2005); *Abimbola* v. *Ashcroft*, 378 F.3d 173, 176-177 (2d Cir. 2004), cert. denied, 126 S. Ct. 734 (2005); *Huerta-Guevara* v. *Ashcroft*, 321 F.3d 883, 886-888 (9th Cir. 2003); *Hernandez-Mancilla* v. *INS*, 246 F.3d 1002, 1009 (7th Cir. 2001). Under the first step of the test, courts employ a "categorical" approach, comparing the statute under which the defendant was convicted with the "generic" definition of "theft offense" to determine whether all conduct covered by the statute falls within the generic definition. If it does, the defendant has been convicted of a theft offense. If the statute covers both conduct that falls within the generic definition and conduct that does not, courts move to the second step, where they employ a "modified categorical" approach and review certain documents in the record of the criminal case, such as the charging instrument and judgment, to determine whether the particular offense of which the defendant was convicted satisfies the generic definition.

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[1] Under the ACCA, defendants convicted of certain firearms offenses are subject to a mandatory minimum prison term of 15 years if they have three previous convictions for a "serious drug offense" or "violent felony." 18 U.S.C. 924(e)(1) (2000 & Supp. IV 2004). The definition of "violent felony" includes "burglary." 18 U.S.C. 924(e)(2)(B)(ii).

2. Respondent is a native and citizen of Peru. In 1992, he was convicted in the Superior Court of California of burglary, and, in 1994, he was convicted in the same court of possession of a firearm by a felon. Despite those convictions, respondent became a lawful permanent resident in 1998. Pet. App. 6a-7a, 14a.

In 2002, respondent was charged in the Superior Court of California with unlawful driving or taking of a vehicle, in violation of California Vehicle Code § 10851(a) (West 2000). The information alleged that respondent willfully and unlawfully drove or took a 1992 Honda Accord without the consent of the owner and with the intent to deprive the owner of title to and possession of the vehicle. Respondent pleaded guilty to the charge and was sentenced to three years of imprisonment. Pet. App. 7a-8a, 11a-13a.

3. In February 2004, the Department of Homeland Security initiated removal proceedings against respondent. He was charged with removability under Section 237(a)(2)(A)(i) of the INA, 8 U.S.C. 1227(a)(2)(A)(i), for having been convicted of a crime involving moral turpitude, and under Section 237(a)(2)(A)(iii) of the INA, 8 U.S.C. 1227(a)(2)(A)(iii), for having been convicted of an aggravated felony—in particular, a theft offense for which the term of imprisonment is at least one year, 8 U.S.C. 1101(a)(43)(G). Both charges were based on respondent's 2002 conviction. Pet. App. 4a-5a, 9a.

The immigration judge (IJ) ruled that the California offense of unlawful driving or taking of a vehicle was not a crime involving moral turpitude but was a theft offense, and thus an aggravated felony. The IJ accordingly found that respondent was removable from the United States and ordered him removed to Peru. Pet. App. 9a-10a.

The Board of Immigration Appeals (BIA) dismissed respondent's appeal. Pet. App. 3a. Adopting the decision of the IJ, the BIA held that "respondent's conviction for auto theft constitutes an aggravated felony." *Ibid.*

4. While respondent's petition for review was pending in the Ninth Circuit, that court decided *Penuliar* v. *Ashcroft*, 395 F.3d 1037 (2005), amended, 435 F.3d 961 (2006), petition for cert. pending, No. 05-1630 (filed June 22, 2006).

In *Penuliar*, the Ninth Circuit held that a violation of California Vehicle Code § 10851(a) is not a "theft offense" under 8 U.S.C. 1101(a)(43)(G) as a "categorical" matter. 395 F.3d at 1044-1045. The Ninth Circuit explained that it had held in *United States* v. *Corona-Sanchez*, 291 F.3d 1201 (2002) (en banc), that a violation of California's general-theft statute, Cal. Penal Code § 484(a) (West Supp. 2006), is not categorically a "theft offense," in part because "a defendant can be convicted of the substantive offense for aiding and abetting a theft," and that it had "applied this same reasoning" in *Martinez-Perez* v. *Ashcroft*, 393 F.3d 1018 (9th Cir. 2004), withdrawn and superseded, 417 F.3d 1022 (9th Cir. 2005), which held that a violation of California's grand-theft statute, Cal. Penal Code § 487(c) (West Supp. 2006), is not categorically a "theft offense." 395 F.3d at 1044. The court found that a violation of California's vehicle-theft statute is not categorically a "theft offense" for "the same reason." *Ibid.* In particular, the Ninth Circuit reasoned that Section 10851(a) can be violated if the defendant is "a party or an accessory to or an accomplice in" the unauthorized taking of the vehicle and that such conduct does not necessarily entail the taking of property or the exercise of control over prop-

erty, which the court considered an essential element of the generic definition of "theft offense." *Ibid.*

In *Penuliar*, the Ninth Circuit also held that the Section 10851(a) convictions at issue in that case were not for a "theft offense" under the "modified categorical" approach. 395 F.3d at 1045-1046. Although the charges to which Penuliar pleaded guilty described him as a principal, the court deemed that fact insufficient to establish that he had been convicted of a generic "theft offense," because a defendant in California may be convicted as an aider and abettor even when an aiding-and-abetting theory is not recited in the charging instrument. *Ibid.*

The government petitioned for rehearing en banc in *Penuliar*, arguing that the generic definition of "theft offense" includes aiding and abetting. The Ninth Circuit denied the petition and issued an amended opinion. *Penuliar* v. *Gonzales*, 435 F.3d 961 (2006), petition for cert. pending, No. 05-1630 (filed June 22, 2006). The amended opinion was identical in substance to the initial opinion except that it included a footnote rejecting the contention raised in the rehearing petition, *id.* at 970 n.6, on the ground that the Ninth Circuit had already held in *Martinez-Perez* v. *Gonzales*, 417 F.3d 1022 (2005), that the generic definition of "theft offense" excludes aiding and abetting.

5. After the amended opinion in *Penuliar* was issued, the court of appeals granted respondent's petition for review in this case. Pet. App. 1a-2a. The court explained that the IJ had found that respondent's conviction for unlawful driving or taking of a vehicle "categorically met the definition of a theft offense" and that the court had "recently held" in *Penuliar* that "a violation of section 10851(a) does *not* categorically qualify as a

"theft offense" because that section is broader than the generic definition." *Id.* at 2a (emphasis added). The court therefore "remand[ed] th[e] petition to the [BIA] for further proceedings in light of *Penuliar*." *Ibid.*

SUMMARY OF ARGUMENT

Respondent was convicted of a "theft offense," and thus an aggravated felony, under the INA, 8 U.S.C. 1101(a)(43)(G).

A. The "generic" definition of "theft offense" is the sense in which the term is used in the criminal codes of most States. See *Taylor* v. *United States*, 495 U.S. 575, 589, 598 (1990). In the criminal codes of *all* States, as well as in the United States Code, the definition of *every* substantive offense includes aiding and abetting, because aiders and abettors are treated as principals. Consistent with that uniformly held view, courts outside the Ninth Circuit have correctly held that aiding and abetting is included in the definition of other predicate offenses: "arson" and "burglary," under the ACCA; "crime of violence," under the bail statute; and "illicit trafficking in a controlled substance" and "an offense that involves fraud or deceit," under the INA. So, too, aiding and abetting is included in the definition of "theft offense."

The INA's definition of "aggravated felony" confirms that aiding and abetting a specified offense constitutes an aggravated felony in the absence of an express exception. The definition includes alien smuggling and certain types of passport fraud, but excludes first offenses in those categories if the alien committed the offense "for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent" to violate the immigration laws. 8 U.S.C. 1101(a)(43)(N) and (P). If aiding

and abetting an aggravated felony were not itself an aggravated felony, those limited exceptions would be unnecessary.

The Ninth Circuit's contrary rule is flawed in a number of respects. Most fundamentally, it ignores the fact that, under the law of every jurisdiction, a person who aids and abets an offense has *committed* that offense, and is *guilty* of it. The Ninth Circuit's rule is based, instead, on the "arcane distinctions" of the common law, *Taylor*, 495 U.S. at 593, which are meant to play no role in formulating the "generic" definition of an offense. Adoption of the Ninth Circuit's rule would also have consequences that Congress could not have intended. One is that those who aid and abet the commission of a federal offense would be subject to the same criminal penalties as a principal but not to the same immigration consequences. Another is that, because a violation of a theft statute would never be a "theft offense" under the Ninth Circuit's "categorical" holding and would only rarely be one under its "modified categorical" holding, just a small fraction of those convicted of violating a theft statute in any jurisdiction would be deemed to have committed a "theft offense."

There is no evidence that Congress intended to depart from the uniformly held view that aiders and abettors are to be treated as principals. In particular, the fact that the INA's definition of "aggravated felony" explicitly includes attempt and conspiracy but not aiding and abetting, 8 U.S.C. 1101(a)(43)(U), does not mean that Congress intended to exclude aiding and abetting from the definition. There was good reason to include attempt and conspiracy but not aiding and abetting. Unlike aiding and abetting, attempt and conspiracy are distinct from the underlying offense, and thus would not

constitute an aggravated felony unless Congress explicitly so provided.

B. In *Penuliar* v. *Gonzales*, 435 F.3d 961 (2006), petition for cert. pending, No. 05-1630 (filed June 22, 2006), on which the decision below relied, the Ninth Circuit understood the California vehicle-theft statute to reach both principals and aiders and abettors, and held that a violation of that statute was not "categorically" a "theft offense" based on its view that a "theft offense" does not include aiding and abetting. Because that view is mistaken, the Ninth Circuit's judgment should be reversed.

In addition to "party" and "accomplice," the vehicle-theft statute uses the term "accessory." Cal. Veh. Code § 10851(a) (West 2000). In Section 32 of the California Penal Code, an "accessory" is an accessory after the fact. If an "accessory" in Section 10851(a) of the Vehicle Code is also an accessory after the fact, a violation of that statute is not a "theft offense" as a "categorical" matter, because an accessory after the fact, unlike an aider and abettor, is not treated as a principal. It is not clear that Section 10851(a) reaches accessories after the fact. But even if it does, respondent was still convicted of a "theft offense" under the "modified categorical" approach, because he was charged as a principal, and a defendant charged as a principal can be convicted as an aider and abettor but not as an accessory after the fact.

ARGUMENT

RESPONDENT WAS CONVICTED OF A "THEFT OFFENSE," AND THUS AN AGGRAVATED FELONY, UNDER THE IMMIGRATION AND NATIONALITY ACT

Like the definition of any criminal offense, the generic definition of "theft offense" in the INA, 8 U.S.C.

1101(a)(43)(G), covers both those who actually commit the offense and those who aid and abet its commission. The information to which respondent pleaded guilty, which charged him with vehicle theft in violation of California Vehicle Code § 10851(a) (West 2000), encompassed those two theories of liability, and encompassed no theory of liability that is not covered by the generic definition. It follows that respondent was convicted of a "theft offense," and thus an aggravated felony, under the INA.

A. The Generic Definition Of "Theft Offense" Includes Aiding And Abetting

As this Court made clear in *Taylor* v. *United States*, 495 U.S. 575 (1990), the "generic" definition of an offense—in that case "burglary," in this case "theft offense"—is the "sense in which the term is now used in the criminal codes of most States." *Id.* at 598; accord *id.* at 589 (generic definition "correspond[s] to the definitions of [the offense] in a majority of the States' criminal codes"); see *United States* v. *Corona-Sanchez*, 291 F.3d 1201, 1205 (9th Cir. 2002) (en banc) (recognizing this principle in determining generic definition of "theft offense"); *In re V-Z-S-*, 22 I. & N. Dec. 1338, 1345 (B.I.A. 2000) (en banc) (relying on state statutes in determining generic definition of "theft offense"). In the criminal codes of *all* States, as well as in the criminal title of the United States Code, the definition of "theft offense"—and, indeed, of every substantive criminal offense—includes aiding and abetting. That is because the acts of an aider and abettor are deemed to be those of a principal as a matter of law, such that a defendant who aids and abets the commission of an offense is guilty of that offense. The Ninth Circuit therefore erred in hold-

ing that "aiding and abetting liability is [not] included in the generic definition of a 'theft offense'" as that term is used in the INA. *Penuliar* v. *Gonzales*, 435 F.3d 961, 970 n.6 (2006), petition for cert. pending, No. 05-1630 (filed June 22, 2006).[2]

1. In every jurisdiction, aiding and abetting is not separate and distinct from the underlying offense

At common law, "the subject of principals and accessories was riddled with 'intricate' distinctions." *Standefer* v. *United States*, 447 U.S. 10, 15 (1980) (quoting 2 James Fitzjames Stephen, *A History of the Criminal Law of England* 231 (1883)). In felony cases, parties to a crime were divided into four categories: (1) "principals in the first degree," who actually committed the crime; (2) "principals in the second degree," who were present at the scene of the crime and aided and abetted its commission; (3) "accessories before the fact," who aided and abetted the crime but were not present at the scene; and (4) "accessories after the fact," who rendered assistance after the crime was completed. *Ibid.*; see, *e.g.*, 4 William Blackstone, *Commentaries* *34-40.

By the early twentieth century, a number of jurisdictions had "abolishe[d] the distinction between principals

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[2] The generic definition applied by the Ninth Circuit is "a taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." *Penuliar*, 435 F.3d at 969 (quoting *Huerta-Guevara* v. *Ashcroft*, 321 F.3d 883, 886 (9th Cir. 2003), in turn quoting *Corona-Sanchez*, 291 F.3d at 1205). Other courts of appeals apply the same definition, and the BIA applies a similar one. See *Abimbola* v. *Ashcroft*, 378 F.3d 173, 176 (2d Cir. 2004) (citing cases), cert. denied, 126 S. Ct. 734 (2005). Except insofar as the Ninth Circuit excludes aiding and abetting, we do not challenge its general formulation of the definition.

and accessories and ma[de] them all principals." *Hammer* v. *United States*, 271 U.S. 620, 628 (1926); see *Standefer*, 447 U.S. at 16-19 (discussing statutes). By the middle of that century, long before the term "aggravated felony" first appeared in Section 101(a) of the INA, see Pub. L. No. 100-690, Tit. VII, Subtit. J, § 7342, 102 Stat. 4469-4470, it was "well engrained in the law" that one who aids and abets the commission of an act "is as responsible for that act as if he committed it directly." *Nye & Nissen* v. *United States*, 336 U.S. 613, 618 (1949) (quoting jury instruction). And by the beginning of *this* century, "[a]ll [S]tates," as well as the federal government, had "expressly abrogated the distinction between principals and accessories before the fact." 2 Wayne R. LaFave, *Substantive Criminal Law* § 13.1(e), at 333 (2d ed. 2003) (LaFave); see *id.* § 13.1(e), at 333 n.75.[3]

As the Ninth Circuit has recognized elsewhere, the effect of the modern statutes is that "[a]iding and abetting is not a separate and distinct offense from the underlying substantive crime, but is a different theory of liability for the same offense." *United States* v. *Garcia*, 400 F.3d 816, 820, cert. denied, 126 S. Ct. 839 (2005). Thus, under the pertinent federal criminal statute,

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[3] The crime of accessory *after* the fact has survived the abolition of the common-law categories. While what used to be called principals in the second degree and accessories before the fact are now considered aiders and abettors, and thus are treated the same as what were formerly principals in the first degree, accessories after the fact are not treated as principals and are deemed to have committed an offense distinct from the underlying crime—namely, giving aid after the offense has been committed, with knowledge that it has been committed, for the purpose of hindering the offender's apprehension, conviction, or punishment. See, *e.g.*, 18 U.S.C. 3; Cal. Penal Code § 32 (West 1999). See generally 2 LaFave § 13.1, at 326-327; *id.* § 13.6(a), at 400-402, 404.

which is now nearly a century old, see *Standefer*, 447 U.S. at 18, whoever "commits an offense against the United States," or "aids, abets, counsels, commands, induces or procures its commission," or "willfully causes an act to be done which if directly performed by him or another would be an offense against the United States," is "punishable as a principal." 18 U.S.C. 2.[4] So, too, under the California statute, which is *more* than a century old, see *People* v. *Nguyen*, 26 Cal. Rptr. 2d 323, 329 (Ct. App. 1993), "[a]ll persons concerned in the commission of a crime, * * * whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, * * * are principals." Cal. Penal Code § 31 (West 1999); accord Cal. Penal Code § 971 (West 1985) (abrogating distinctions among principal in the first degree, principal in the second degree, and accessory before the fact, and providing that "all persons concerned in the commission of a crime" shall be "prosecuted, tried and punished as principals").

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[4] Under the original version of the federal statute, it was even clearer that aiding and abetting is not separate and distinct from the underlying offense. That version provided that "[w]hoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, *is* a principal." Act of Mar. 4, 1909, ch. 321, § 332, 35 Stat. 1152 (emphasis added). Congress replaced the phrase "is a principal" with the phrase "is punishable as a principal," see Act of Oct. 31, 1951, ch. 655, § 17b, 65 Stat. 717, for a very specific reason: to make clear that a person who is not a member of the class at which a statute is directed—for example, federal employees—can aid and abet a crime committed by a person who is. See *Standefer*, 447 U.S. at 18 n.11. The amended statute therefore reflects the very same "congressional intent to treat accessories before the fact as principals" that its predecessor did. *Ibid.*

The other 49 States, as well as the District of Columbia, have similar statutes, which are reproduced, along with the federal and California statutes, in an appendix to this brief. App., *infra*, 1a-15a. Some of those statutes, like their federal and California counterparts, provide that an aider and abettor is a principal, or at least is treated as one.[5] Some provide that an aider and abettor is "guilty" of the principal offense,[6] while others provide that an aider and abettor is "criminally liable," or "criminally responsible," for the offense.[7] Still others

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[5] See D.C. Code § 22-1805 (2001); Fla. Stat. Ann. § 777.011 (West 2005); Idaho Code Ann. § 19-1430 (2004); Iowa Code Ann. § 703.1 (West 2003); La. Rev. Stat. Ann. § 14:24 (1997); Md. Code Ann., Crim. Proc. § 4-204(b) (LexisNexis 2001 & Supp. 2005); Mass. Ann. Laws ch. 274, § 2 (LexisNexis 1992); Mich. Comp. Laws Ann. § 767.39 (West 2000); Miss. Code Ann. § 97-1-3 (West 2005); Neb. Rev. Stat. Ann. § 28-206 (LexisNexis 2003); Nev. Rev. Stat. Ann. § 195.020 (LexisNexis 2006); N.C. Gen. Stat. § 14-5.2 (2005); Ohio Rev. Code Ann. §§ 2923.03(A), 2923.03(F) (LexisNexis 2006); Okla Stat. Ann. tit. 21, § 172 (West 2002); R.I. Gen. Laws § 11-1-3 (2002); S.C. Code Ann. § 16-1-40 (2003); S.D. Codified Laws §§ 22-3-3, 22–3-3.1 (2005); Vt. Stat. Ann. tit. 13, §§ 3-4 (1998); Va. Code Ann. § 18.2-18 (2004); W. Va. Code Ann. § 61-11-6 (LexisNexis 2005); Wyo. Stat. Ann. § 6-1-201 (2005).

[6] See Alaska Stat. §§ 11.16.100, 11.16.110 (2004); Ariz. Rev. Stat. Ann. §§ 13-301, 13-302, 13-303(A) (2001); Colo. Rev. Stat. §§ 18-1-601, 18-1-603 (2005); Del. Code Ann. tit. 11, § 271 (2001); Haw. Rev. Stat. Ann. §§ 702-221, 702-222 (LexisNexis 2003); Ky. Rev. Stat. Ann. § 502.020(1) (LexisNexis 1999); Me. Rev. Stat. Ann. tit. 17-A, § 57 (2006); Mo. Ann. Stat. §§ 562.036, 562.041(1) (West 1999); N.H. Rev. Stat. Ann. § 626:8 (LexisNexis Supp. 2005); N.J. Stat. Ann. § 2C:2-6 (West 2005); Or. Rev. Stat. §§ 161.150, 161.155 (2005); 18 Pa. Cons. Stat. Ann. § 306 (West 1998); Wash. Rev. Code Ann. § 9A.08.020 (West 2000).

[7] See Ala. Code §§ 13A-2-20, 13A-2-23 (LexisNexis 2005); Ark. Code Ann. §§ 5-2-402, 5-2-403(a) (2006); Conn. Gen. Stat. Ann. § 53a-8(a) (West 2001); 720 Ill. Comp. Stat. Ann. 5/5-1, 5/5-2 (West 2002); Kan. Stat. Ann. § 21-3205(1) (1995); Minn. Stat. Ann. § 609.05 subdiv. 1 (West 2003); Mont. Code Ann. §§ 45-2-301, 45-2-302 (2005); N.Y. Penal Law

provide that an aider and abettor "commits" the principal offense, or at least may be "convicted of commission" of the offense.[8]

In addition to the laws of the States (and of the United States), the Model Penal Code has sometimes been thought relevant in determining the generic definition of an offense. See, *e.g.*, *Taylor*, 495 U.S. at 580, 598 n.8 ("burglary" under the ACCA); *Hernandez-Mancilla* v. *INS*, 246 F.3d 1002, 1007 (7th Cir. 2001) ("theft offense" under the INA); *V-Z-S-*, 22 I. & N. Dec. at 1344-1345 (same). And, like many of the state statutes that appear to be based upon it, the Model Penal Code provides that an aider and abettor is "guilty" of the principal offense. Model Penal Code § 2.06, at 295-296 (1985).[9]

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§ 20.00 (McKinney 2004); Tenn. Code Ann. §§ 39-11-401(a), 39-11-402 (2003); Tex. Penal Code Ann. §§ 7.01, 7.02(a) (Vernon 2003); Utah Code Ann. § 76-2-202 (2003).

[8] See Ga. Code Ann. § 16-2-20 (2003); Ind. Code Ann. § 35-41-2-4 (LexisNexis 2004); N.M. Stat. § 30-1-13 (2004); N.D. Cent. Code § 12.1-03-01(1) (1997); Wis. Stat. Ann. § 939.05 (West 2005).

[9] Under the applicable provision, "[a] person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable," Model Penal Code § 2.06(1), at 295; a person is legally accountable for the conduct of another person if (among other things) "he is an accomplice of such other person in the commission of the offense," *id.* § 2.06(2)(c), at 296; and a person is an accomplice of another person if, "with the purpose of promoting or facilitating the commission of the offense," he (among other things) "solicits such other person to commit it" or "aids or agrees or attempts to aid such other person in planning or committing it," *id.* § 2.06(3)(a)(i) and (ii), at 296.

2. Aiding and abetting has been held to be included in the definition of predicate offenses similar to the one at issue here

Consistent with the uniformly held view described above, federal courts of appeals outside the Ninth Circuit have treated aiders and abettors as principals in circumstances analogous to those here. They have held, correctly, that the definitions of particular predicate offenses, including offenses that constitute an aggravated felony under the INA, encompass aiding and abetting.

For example, the Second Circuit has held that aiding and abetting is encompassed within the generic definition of "arson," which is a "violent felony" under the ACCA, 18 U.S.C. 924(e)(2)(B)(ii). *United States* v. *Hathaway*, 949 F.2d 609 (1991) (per curiam), cert. denied, 502 U.S. 1119 (1992). The court reasoned that *Taylor* requires courts to look to "modern definitions"; that "the laws of many states today include counseling, aiding or procuring the burning within the definition of actual arson"; and that "[a]iding and abetting also supports a substantive conviction for arson under Federal law." *Id.* at 610-611 (citing 18 U.S.C. 2).

Similarly, the Seventh Circuit has held that the generic definition of "burglary," which is also a "violent felony" under the ACCA, "extends to the context of aiding and abetting," such that "one who aided and abetted the commission of a generic burglary has committed generic burglary." *United States* v. *Groce*, 999 F.2d 1189, 1192 (1993). The court relied on the fact that "both federal law and * * * state law punish an aider and abettor as a principal." *Ibid.* (citing 18 U.S.C. 2).

The First Circuit has held that aiding and abetting is encompassed within the definition of "crime of violence" under the Bail Reform Act of 1984, 18 U.S.C. 3143(a)(2), such that "aiding and abetting the commission of a crime of violence is a crime of violence itself." *United States* v. *Mitchell*, 23 F.3d 1, 3 (1994) (per curiam) (Breyer, C.J., Selya & Boudin, JJ.). The court reasoned that "aiding and abetting 'is not a separate offense' from the underlying substantive crime" and that "the *acts* of the principal [are] those of the aider and abetter as a matter of law." *Id.* at 2-3 (quoting *United States* v. *Sanchez*, 917 F.2d 607, 611 (1st Cir. 1990), cert. denied, 499 U.S. 977 (1991), and *United States* v. *Simpson*, 979 F.2d 1282, 1285 (8th Cir. 1992), cert. denied, 507 U.S. 943 (1993)).

The Eighth Circuit has held that the federal offense of aiding and abetting possession of cocaine with the intent to distribute it categorically constitutes "illicit trafficking in a controlled substance," and thus an aggravated felony, under Sentencing Guidelines § 2L1.2, which incorporates the INA's definition of aggravated felony, 8 U.S.C. 1101(a)(43)(B). *United States* v. *Baca-Valenzuela*, 118 F.3d 1223, 1231-1233 (1997).[10] The court explained its holding as follows:

> A fundamental theory of American criminal law is that there is no offense of aiding and abetting or accomplice liability as such. Instead, accomplice liability is merely a means of determining which persons were closely enough related to the underlying

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[10] Section 2L1.2 of the Guidelines has since been amended to provide, explicitly, that "[p]rior convictions of offenses counted under subsection (b)(1)," one of which is an aggravated felony, "include the offenses of aiding and abetting, conspiring, and attempting, to commit such offenses." Sentencing Guidelines § 2L1.2, comment. (n.5).

> offense to be prosecuted and convicted of that offense. Whether one is convicted *as* a principal or *as* an accomplice/aider and abettor, the crime *of which* he is guilty is the same: whatever is the underlying offense.

Id. at 1232.

Similarly, the Fifth Circuit has held that the federal offense of aiding and abetting bank fraud is an aggravated felony under Section 101(a)(43)(M)(i) of the INA, 8 U.S.C. 1101(a)(43)(M)(i), which covers offenses that "involve[] fraud or deceit in which the loss to the victim or victims exceeds $10,000," because "the underlying offense"—bank fraud—"necessarily involves fraud." *James* v. *Gonzales*, No. 04-60445, 2006 WL 2536614, at *3 (Sept. 5, 2006). The court explained that "'the aiding and abetting statute, 18 U.S.C. § 2, does not define a separate crime,' but rather provides another means of convicting someone of the underlying offense." *Ibid.* (quoting *United States* v. *Sorrells*, 145 F.3d 744, 752 (5th Cir. 1998)).[11]

The Ninth Circuit is the only court of appeals to hold that the generic definition of an offense does not include aiding and abetting. Dissenting judges in that circuit have criticized the holding, however, and have emphasized its dramatic consequences. In one of the cases on which *Penuliar* relied, *Corona-Sanchez*, *supra*, the en banc Ninth Circuit held that the California offense of

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[11] Like "illicit trafficking in a controlled substance," "theft offense," and an "offense that * * * involves fraud or deceit," 8 U.S.C. 1101(a)(43)(B), (G) and (M)(i), "burglary offense" and "crime of violence" are explicitly included in the INA's definition of aggravated felony, 8 U.S.C. 1101(a)(43)(F) and (G). Arson, too, is ordinarily a crime of violence, and thus ordinarily an aggravated felony. *E.g.*, *In re Palacios-Pinera*, 22 I. & N. Dec. 434 (B.I.A. 1998).

general theft is not a theft offense, in part because a defendant can be convicted under an aiding-and-abetting theory. 291 F.3d at 1207-1208. In a dissenting opinion joined by Judges Kozinski, T.G. Nelson, and Kleinfeld, Judge Rymer rejected that reasoning:

> It cannot be that the possibility of being liable as an aider or abettor takes an offense out of the running, for this is true of any crime in California, where principals include those who aid or abet the commission of a crime. Cal. Penal Code § 31. In any event, "[t]o be liable as an aider and abettor, the defendant must have instigated or advised the commission of the offense or have been present for the purpose of assisting." 1 Witkin & Epstein, *California Criminal Law* (3d ed.), § 78, p. 124 (2000). This is unremarkable, and well within the bounds of whichever generic formulation is adopted.

291 F.3d at 1216.[12]

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[12] The BIA—whose interpretation of an immigration statute is entitled to deference, as long it is reasonable, see *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999)—has not addressed the question presented in this case in a published decision. While the BIA has held that a violation of California Vehicle Code § 10851(a) is a "theft offense" under the INA, *V-Z-S-*, *supra*, the decision in that case did not address the theory subsequently adopted by the Ninth Circuit in *Penuliar*. And while the BIA has addressed, and rejected, the argument that aiding and abetting is not included within the definition of "aggravated felony" in general, *In re Malacas*, No. A41 245 089, 2004 WL 2374341 (Sept. 13, 2004), the decision in that case is unpublished and has not been designated as a precedent, see 8 C.F.R 1003.1(g).

3. The text of 8 U.S.C. 1101(a)(43) confirms that the generic definition of "theft offense" encompasses aiding and abetting

The text of 8 U.S.C. 1101(a)(43) confirms that the term "aggravated felony" includes aiding and abetting the specified offense. In 8 U.S.C. 1101(a)(43)(N) and (P), respectively, Congress made alien smuggling and certain types of passport fraud aggravated felonies. In each instance, however, Congress created an exception for a "case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate [the immigration laws]." 8 U.S.C. 1101(a)(43)(N) and (P). For those crimes, see 8 U.S.C. 1324(a)(1)(A) and (2); 18 U.S.C. 1543 (2000 & Supp. IV 2004); 18 U.S.C. 1546(a) (Supp. IV 2004), aiding and abetting is not treated differently than for any other federal crime. Under 18 U.S.C. 2, a person who aids and abets alien smuggling or passport fraud is liable as a principal. See also 8 U.S.C. 1324(a)(1)(A)(v)(II) (making it a crime to "aid[] or abet[] the commission of any of the preceding acts" made criminal by the alien-smuggling statute). If aiding and abetting an aggravated felony were not itself an aggravated felony, the exceptions in 8 U.S.C. 1101(a)(43)(N) and (P) would be unnecessary, because *no one* who merely aided and abetted alien smuggling or passport fraud—or, for that matter, any of the other listed offenses—would be an aggravated felon. The inclusion of an exception for a limited class of aiders and abettors confirms that Congress intended to reach all others.

4. The Ninth Circuit's rule is inconsistent with this Court's decision in* Taylor *and has consequences that Congress could not have intended

The Ninth Circuit's rule—that the generic definition of "theft offense" excludes aiding and abetting—is flawed on a number of levels. First, and most fundamentally, it rests on the mistaken premise that aiding and abetting is separate and distinct from the underlying offense. It ignores the fact that, under the law of every jurisdiction, a person who aids and abets a crime has *committed* that crime, and is *guilty* of it, such that aiding and abetting a "theft offense" is *itself* a "theft offense."

Second, while the modern criminal codes have abolished the common law's technical distinctions between principal and accessory, the Ninth Circuit resurrected those very distinctions in imposing a narrow, "principal-only" limitation on the generic definition. The Ninth Circuit's definition is therefore doubly inconsistent with *Taylor*. It is not what *Taylor* says a generic definition should be—one that reflects the rule in "a majority of the States' criminal codes." 495 U.S. at 589; accord *id.* at 598. And it *is* what *Taylor* says a generic definition should *not* be—one that reflects the "arcane distinctions embedded in the common[ ]law." *Id.* at 593; accord *id.* at 589.

Third, the Ninth Circuit's interpretation of the INA presumes that Congress intended that a theft offense include aiding and abetting for purposes of the federal criminal laws, see 18 U.S.C. 2, but not for purposes of the federal immigration laws. Under the Ninth Circuit's view, someone convicted of (for example) aiding and abetting the theft of public money, see 18 U.S.C. 641

(2000 & Supp. IV 2004), would be subject to the same criminal penalties as a principal but not to the same immigration consequences. It is highly implausible that Congress intended such a result.

Fourth, under the Ninth Circuit's approach, only a small fraction of those convicted of violating a theft statute would be deemed to have been convicted of a "theft offense." A violation of a theft statute would *never* be deemed a "theft offense" under the Ninth Circuit's "categorical" holding, because every theft statute can be violated by aiding and abetting.[13] And a violation of a theft statute would only *rarely* be deemed a "theft offense" under the Ninth Circuit's "modified categorical" holding, because, for the very reason that someone who commits a crime and someone who aids and abets its commission are treated the same in every jurisdiction, a defendant charged as a principal can be convicted as an aider and abettor. See, *e.g.*, Cal. Penal Code § 971 (West 1985) ("no other facts need be alleged in any accusatory pleading against any * * * person [concerned in the commission of a crime] than are required in an accusatory pleading against a principal"). See generally 2 LaFave § 13.1(e), at 335; *id.* § 13.6(a), at 405. Producing the charging instrument and corresponding judgment—the most common method of establishing a prior conviction in a removal proceeding—would therefore be insufficient.

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[13] The Ninth Circuit's "categorical" holding is not limited to theft statutes, like the one under which respondent was convicted, that include their own aiding-and-abetting provisions. See *Martinez-Perez* v. *Gonzales*, 417 F.3d 1022, 1027-1028 (9th Cir. 2005) (grand theft under California Penal Code § 487(c) (West Supp. 2006)); *Corona-Sanchez*, 291 F.3d at 1207-1208 (general theft under California Penal Code § 484(a) (West Supp. 2006)).

Under the Ninth Circuit's approach, the only cases in which the government would be able to establish that an alien who pleaded guilty was convicted of a "theft offense" would likely be ones in which the plea colloquy showed that the alien acted alone or was otherwise a "true" principal. Cf. *Shepard* v. *United States*, 544 U.S. 13, 21 (2005) (transcript of plea colloquy may be used to determine whether defendant pleaded guilty to generic "burglary"). And the only cases in which the government would be able to show that an alien who stood trial was convicted of a "theft offense" would likely be ones in which the jury was not instructed on an aiding-and-abetting theory and therefore must have found that the alien was a principal. Cf. *Taylor*, 495 U.S. at 602 (jury instructions may be used to determine whether jury found defendant guilty of generic "burglary"). But plea colloquies and jury charges are not always transcribed; even when they have been transcribed, the transcript is often unavailable or difficult to obtain by the time removal proceedings are commenced; and even when the transcript can be obtained, it may reflect that, in pleading guilty, the alien admitted only that he committed the statutory offense, or that, at the conclusion of trial, the jury was instructed that it could find the alien guilty *either* as a principal *or* as an aider or abettor. In any of those circumstances, it would be impossible to know whether the alien was convicted as a principal or an aider and abettor. It is highly improbable that Congress contemplated a regime in which only a small proportion of those convicted of violating a theft statute could be shown to be removable on the basis of having been convicted of a "theft offense." Cf. *id.* at 594 ("[C]onstruing 'burglary' to mean common-law burglary would come close to nullifying that term's effect in the statute, be-

cause few of the crimes now generally recognized as burglaries would fall within the common-law definition.").

Finally, there is no obvious reason why the Ninth Circuit's rule would not apply to other crimes that constitute an aggravated felony under 8 U.S.C. 1101(a)(43) (2000 & Supp. IV 2004). The rationale for the rule is that aiding and abetting a theft does not require the taking of or exercise of control over property, which the court deemed an essential element of the generic definition of "theft offense." *Penuliar*, 435 F.3d at 970. While, under that rationale, there may be some offenses whose generic definition is satisfied by aiding and abetting, there are not likely to be many. For example, one can aid and abet "murder," 8 U.S.C. 1101(a)(43)(A), without personally taking the life of another; one can aid and abet "rape," *ibid.*, without engaging in forcible sex; and one can aid and abet "burglary," 8 U.S.C. 1101(a)(43)(G), without entering or remaining in a building, *Taylor*, 495 U.S. at 599. Because there does not appear to be any principled basis for distinguishing those crimes from a "theft offense" for present purposes, consistent application of the Ninth Circuit's rule would prevent the removal of a very substantial proportion of the criminal aliens who have been convicted of crimes listed in 8 U.S.C. 1101(a)(43)(G). It is even less likely that Congress intended *that* result.

5. There is no indication that Congress intended to depart from the uniform rule that aiders and abettors are treated as principals

The INA's definition of "aggravated felony" includes a long list of offenses. 8 U.S.C. 1101(a)(43)(A)-(T) (2000 & Supp. IV 2004). It also provides that the term encom-

passes "an attempt or conspiracy to commit an offense described in this paragraph." 8 U.S.C. 1101(a)(43)(U). The fact that the definition explicitly includes attempt and conspiracy but not aiding and abetting does not mean, however, that Congress intended to exclude aiding and abetting. The express exceptions in 8 U.S.C. 1101(a)(43)(N) and (P) for certain instances of aiding and abetting makes the general inclusion of aiding and abetting clear. See p. 20, *supra*. Moreover, the differential treatment of attempt and conspiracy reflects critical differences between conspiracy and attempt, on the one hand, and aiding and abetting, on the other. Unlike aiding and abetting, attempt and conspiracy are distinct from the underlying offense,[14] and therefore would not constitute an aggravated felony unless Congress explicitly so provided. Indeed, the express inclusion of attempt and conspiracy, which ordinarily entail conduct further removed from the underlying substantive offense than does aiding and abetting, only underscores the anomaly introduced by the Ninth Circuit's rule, under which remote conspirators would be included, but

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[14] See, *e.g.*, *Iannelli* v. *United States*, 420 U.S. 770, 777 (1975) ("Traditionally the law has considered conspiracy and the completed substantive offense to be separate crimes."); *Pinkerton* v. *United States*, 328 U.S. 640, 643 (1946) ("It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses."); *Garcia*, 400 F.3d at 819 ("In an attempt case there is no crime apart from the attempt, which is the crime itself[.]"); 2 LaFave§ 11.2(a), at 207 ("attempt [i]s a distinct crime"). Consistent with this view, California law provides that aiders and abettors "are principals," Cal. Penal Code § 31 (West 1999), but makes attempt and conspiracy separate offenses, see *id.* § 182(a)(1) (West Supp. 2006) (conspiracy); *id.* § 664 (attempt).

not aiders and abettors, whom the law has long treated as indistinguishable from principals.

Unlike the INA, the Sentencing Guidelines do explicitly include aiding and abetting—as well as attempt and conspiracy—as an "aggravated felony." Sentencing Guidelines § 2L1.2, comment. (n.5); see note 10, *supra*. It is hardly unusual, however, for a legislature (or an agency) to include in a statute (or a regulation) a principle of law that would apply even if it were omitted, so as to remove any conceivable doubt. And even if it *were* unusual, the *Sentencing Commission's* inclusion of particular language in the Guidelines would not be evidence of what *Congress* intended when it enacted the INA—especially since aiding-and-abetting liability is *automatically* included as a form of principal liability under federal law and the laws of all 50 States, whether or not it is explicitly mentioned in the particular criminal statute at issue. Indeed, the Guidelines themselves apply that principle, providing that the offense level for aiding and abetting "is the same level as that for the underlying offense." Sentencing Guidelines § 2X2.1.

As part of proposals for comprehensive reform of the immigration laws, two pending bills would amend 8 U.S.C. 1101(a)(43)(U) to make explicit, as the Guidelines do, that the definition of "aggravated felony" includes aiding and abetting.[15] For the same reasons that are set

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[15] The House bill would amend the statute to provide that "aggravated felony" includes "soliciting, aiding, abetting, counseling, commanding, inducing, procuring or an attempt or conspiracy to commit an offense described in this paragraph." *Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005*, H.R. 4437, 109th Cong., 1st Sess. § 201(a)(3) (passed Dec. 16, 2005). The Senate bill would amend the statute to provide that "aggravated felony" includes "aiding or abetting an offense described in this paragraph, or soliciting,

forth above, however, the proposed amendment does not suggest that the Congress that enacted the current version of the statute intended to exclude aiding and abetting from the definition of "aggravated felony." As the Judiciary Committee Report accompanying the House bill explains, the purpose of adding aiding and abetting to 8 U.S.C. 1101(a)(43)(U) is simply to "make[] clear" that it is included in the definition of aggravated felony and to "reverse" contrary "Ninth Circuit precedent." H.R. Rep. No. 345, 109th Cong., 1st Sess. 59 (2005). The proposed amendment, in other words, is intended to clarify existing law, not to change it.

B. The Offense Of Which Respondent Was Convicted Satisfies The Generic Definition Of "Theft Offense"

1. The California statute under which respondent was convicted makes it a crime, not only to engage in an unauthorized taking or stealing of a vehicle, but also to be "a party or an accessory to or an accomplice in" the unauthorized taking or stealing. Cal. Veh. Code § 10851(a) (West 2000). Understanding the latter portion of the statute to criminalize aiding and abetting, the Ninth Circuit in *Penuliar* held that a violation of the vehicle-theft statute is not a "theft offense" as a "categorical" matter, because, in the Ninth Circuit's view, the generic definition of "theft offense" excludes aiding and abetting. 435 F.3d at 969-970. The Ninth Circuit relied on that holding in granting respondent's petition for

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counseling, procuring, commanding, or inducing another, attempting, or conspiring to commit such an offense." *Comprehensive Immigration Reform Act of 2006*, S. 2611, 109th Cong., 2d Sess. § 203(a)(5) (passed May 25, 2006). As of the date of the filing of this brief, it remains the case that no conference committee has been appointed to reconcile the bills, which differ in significant respects.

review. Pet. App. 2a. Because the Ninth Circuit was mistaken in its view that the generic definition of "theft offense" excludes aiding and abetting, it was mistaken in its holding that a violation of California Vehicle Code § 10851(a) is not categorically a "theft offense." Its judgment should therefore be reversed.

2. In his brief in opposition, respondent contended that a violation of the California vehicle-theft statute is not categorically a "theft offense" under the INA for an additional reason: that the statute reaches accessories after the fact. See Br. in Opp. 8-26. That contention, which was raised for the first time in this Court, does not furnish respondent a basis for relief.

a. As noted above, the California statute does not in terms refer to aiding and abetting, but instead makes it a crime to be a "party" to, an "accessory" to, or an "accomplice" in the unauthorized taking of the vehicle. Cal. Veh. Code § 10851(a) (West 2000). The crime of being an "accessory" is addressed in Section 32 of the California Penal Code. It provides that

> [e]very person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony.

Cal. Penal Code § 32 (West 1999). As used in Section 32 of the Penal Code, therefore, an "accessory" is an accessory after the fact. And, unlike aiding and abetting, "[t]he crime of being an accessory [after the fact] is separate and distinct from the underlying felony." 1 B.E. Witkin & Norman L. Epstein, *California Criminal Law*,

Introduction to Crimes § 91, at 144 (3d ed. 2000); see note 3, *supra*. If Section 10851(a) reaches accessories after the fact, therefore, a violation of the statute is not a theft offense as a "categorical" matter.[16]

It is not clear, however, that Section 10851(a) does reach accessories after the fact. California Penal Code § 32 describes an offense—*i.e.*, a proscription of certain conduct; it does not appear to provide a definition of a term—"accessory"—that applies in every California statute in which the term appears. Support for that conclusion is found both in the language of Section 32 itself and in the fact that the very next section of the Penal Code describes the penalties for the offense of being an accessory, see Cal. Penal Code § 33 (West 1999). But even if Section 32 defines a *term*, we are not aware of any case holding that "accessory" in Section 10851(a) of the *Vehicle Code* has the same meaning that it has in Section 32 of the *Penal Code*. Indeed, the very California decision on which the Ninth Circuit relied in *Penuliar*, see 435 F.3d at 970, suggests that Section 10851(a) of the Vehicle Code does not reach accessories after the fact. Instead, that case suggests that the statutory phrase "any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing" is merely shorthand for aider and abettor. See *People* v. *Clark*, 60 Cal. Rptr. 58, 62 (Ct. App. 1967) (to convict a defendant on the theory that he was "a

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[16] This objection is not available in cases involving the other California theft statutes to which the Ninth Circuit has applied its rule that the generic definition of "theft offense" excludes aiding and abetting, because those statutes do not include the term "accessory." See *Martinez-Perez*, 417 F.3d at 1027-1028 (grand theft under California Penal Code § 487(c)); *Corona-Sanchez*, 291 F.3d at 1207-1208 (general theft under California Penal Code § 484(a)).

party or [an] accessory to or an accomplice in the driving," it must be shown that the defendant "aided or assisted" in the driving with the requisite state of mind).[17]

b. It is ultimately irrelevant for purposes of this case, however, whether Section 10851(a) reaches accessories after the fact. Even if it does, even if the statute is therefore broader than the generic definition of "theft offense" in the INA, and even if a violation of Section 10851(a) is for that reason not a "theft offense" as a "categorical" matter, the government has still demonstrated that respondent was convicted of a "theft offense" under the "modified categorical" approach, because the charging instrument and corresponding judgment show that he was not convicted as an accessory after the fact.

Respondent was charged with violating Section 10851(a) as a principal. In particular, he was charged with

> willfully and unlawfully driv[ing] or tak[ing] a certain vehicle, to wit: 1992 Honda Accord, California license number 3JHJ638,[] then and there the per-

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[17] Section 499b(b) of the California Penal Code (West Supp. 2006) provides that "[a]ny person who shall, without the permission of the owner thereof, take any vessel for the purpose of temporarily using or operating the same, is guilty of a misdemeanor." A 2003 law amended that provision to increase the maximum penalties. 2003 Cal. Stat., ch. 391, § 1. An analysis of the bill that became the 2003 law noted that Section 10851(a) of the California Vehicle Code provides "the same penalty for an accessory or accomplice" as for the person who drives or takes the vehicle, and that "[a]ppellate cases interpreting this section appear to require an aiding and abetting standard (intent that the crime be committed and assistance of the perpetrator) for a conviction under this section for any person who did not take or drive the car." S. Comm. on Public Safety, B. Analysis of Assemb. B. 928 (2003-2004 Reg. Sess.), July 8, 2003, at B-C & n.1 (citing *People* v. *Clark*, *supra*).

> sonal property of Deborah and Michael Wood, * * * without the consent of and with the intent to permanently or temporarily deprive the said owner of title to and possession of said vehicle.

Pet. App. 13a. "[W]hile it is now generally accepted that a defendant may be charged as if a principal and convicted on proof that he aided another, a conviction as an accessory after the fact cannot be sustained upon an indictment charging the principal crime." 2 LaFave § 13.6(a), at 405 (footnote omitted).[18] The reason for the distinction is that, because an aider and abettor is treated as a principal and an accessory after the fact is not, a charging instrument alleging that the defendant committed the principal crime "only places him on notice that he must defend against accountability for the crime as a principal or accessory before the fact, not that he must be prepared to meet evidence that he aided the perpetrator after the crime had been committed." *Ibid.*

Accordingly, even if Section 10851(a) covers accessories after the fact, a defendant, like respondent, who was charged with violating the statute as a principal has necessarily *not* been convicted as an accessory after the fact, and therefore *has* been convicted of a "theft offense"—either as a principal or as an aider and abet-

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[18] That is the law in California. See, *e.g.*, *People* v. *Prado*, 136 Cal. Rptr. 521, 523 (Ct. App. 1977) ("a person charged in an indictment as principal cannot be convicted on evidence showing him to be only an accessory after the fact") (citation omitted); *People* v. *Baker*, 330 P.2d 240, 245-246 (Cal. Ct. App. 1958) (defendant "was charged and prosecuted as a principal" and therefore "could not have been convicted as an accessory"), cert. denied, 359 U.S. 956 and 361 U.S. 851 (1959); 17 Cal. Jur. 3d *Criminal Law: Core Aspects* § 124, at 192 (2002) ("one charged as a principal cannot be convicted on proof that he or she was an accessory").

tor—under the "modified categorical" approach. Indeed, it makes little practical difference whether the government is required to meet its burden under the "categorical" or the "modified categorical" approach, because, in this case, as in the vast majority of cases involving a violation of California Vehicle Code § 10851(a), see, *e.g.*, *Penuliar*, 435 F.3d at 971 n.8; *United States* v. *Vidal*, 426 F.3d 1011, 1017 (9th Cir. 2005), reh'g granted, 453 F.3d 1114 (9th Cir. 2006), the same documents that establish the fact of conviction—the charging instrument and corresponding judgment—also establish that the alien was convicted as either a principal or an aider and abettor.

In other words, precisely because the law generally—and California law specifically—treats accessories after the fact as distinct from principals, the "modified categorical" approach will readily allow reviewing courts to exclude the possibility that the defendant was convicted as an accessory after the fact. At the same time, however, because the law generally—and California law specifically—does not distinguish between aiding and abetting and the offense of the principal, the "modified categorical" approach will generally not permit reviewing courts to exclude the possibility that the defendant was convicted as an aider or abettor. Accordingly, the Ninth Circuit's actual holding concerning aiding and abetting, unlike respondent's belated accessory-after-the-fact argument, risks allowing countless individuals who in fact committed aggravated felonies as principals to escape the consequences of their crimes.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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OCTOBER 2006

APPENDIX

AIDING-AND-ABETTING STATUTES

United States: 18 U.S.C. 2(a) ("Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."); 18 U.S.C. 2(b) ("Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.").

Alabama: Ala. Code § 13A-2-20 (LexisNexis 2005) ("A person is criminally liable for an offense if it is committed by his own behavior or by the behavior of another person for which he is legally accountable * * * ."); *id.* § 13A-2-23 ("A person is legally accountable for the behavior of another constituting a criminal offense if, with the intent to promote or assist the commission of the offense[,] (1) [h]e procures, induces or causes such other person to commit the offense; or (2) [h]e aids or abets such other person in committing the offense * * * .").

Alaska: Alaska Stat. § 11.16.100 (2004) ("A person is guilty of an offense if it is committed by the person's own conduct or by the conduct of another for which the person is legally accountable * * * ."); *id.* § 11.16.110 ("A person is legally accountable for the conduct of another constituting an offense if[,] * * * with intent to promote or facilitate the commission of the offense, the person (A) solicits the other to commit the offense; or (B) aids or abets the other in planning or committing the offense * * * .").

Arizona: Ariz. Rev. Stat. Ann. § 13-301 (2001) ("'[A]ccomplice' means a person * * * who with the intent to promote or facilitate the commission of an offense[,] * * * [s]olicits or commands another person to commit the offense; or * * * [a]ids, counsels, agrees to aid or attempts to aid another person in planning or committing the offense."); *id.* § 13-302 ("A person may be guilty of an offense committed by such person's own conduct or by the conduct of another for which such person is criminally accountable * * *, or both."); *id.* § 13-303(A) ("A person is criminally accountable for the conduct of another if * * * [t]he person is an accomplice of such other person in the commission of an offense.").

Arkansas: Ark. Code Ann. § 5-2-402 (2006) ("A person is criminally liable for the conduct of another person if * * * [t]he person is an accomplice of another person in the commission of an offense[.]"); *id.* § 5-2-403(a) ("A person is an accomplice of another person in the commission of an offense if, with the purpose of promoting or facilitating the commission of an offense, the person: (1) [s]olicits, advises, encourages, or coerces the other person to commit the offense; [or] (2) [a]ids, agrees to aid, or attempts to aid the other person in planning or committing the offense[.]").

California: Cal. Penal Code § 31 (West 1999) ("All persons concerned in the commission of a crime, * * * whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, * * * are principals in any crime so committed."); *id.* § 971 (West 1985) ("The distinction between an acces-

sory before the fact and a principal, and between principals in the first and second degree is abrogated; and all persons concerned in the commission of a crime, who by the operation of other provisions of this code are principals therein, shall hereafter be prosecuted, tried and punished as principals * * * .").

Colorado: Colo. Rev. Stat. § 18-1-601 (2005) ("A person is guilty of an offense if it is committed by the behavior of another person for which he is legally accountable * * * ."); *id.* § 18-1-603 ("A person is legally accountable as principal for the behavior of another constituting a criminal offense if, with the intent to promote or facilitate the commission of the offense, he or she aids, abets, advises, or encourages the other person in planning or committing the offense.").

Connecticut: Conn. Gen. Stat. Ann. § 53a-8(a) (West 2001) ("A person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender.").

Delaware: Del. Code Ann. tit. 11, § 271 (2001) ("A person is guilty of an offense committed by another person when[,] * * * [i]ntending to promote or facilitate the commission of the offense[,] the person * * * [s]olicits, requests, commands, importunes or otherwise attempts to cause the other person to commit it; or * * * [a]ids, counsels or agrees or attempts to aid the other person in planning or committing it[.]").

District of Columbia: D.C. Code § 22-1805 (2001) ("In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories * * * .").

Florida: Fla. Stat. Ann. § 777.011 (West 2005) ("Whoever commits any criminal offense against the state, * * * or aids, abets, counsels, hires, or otherwise procures such offense to be committed * * * , is a principal in the first degree and may be charged, convicted, and punished as such, whether he or she is or is not actually or constructively present at the commission of such offense.").

Georgia: Ga. Code Ann. § 16-2-20(a) (2003) ("Every person concerned in the commission of a crime is a party thereto and may be charged with and convicted of commission of the crime."); *id.* § 16-2-20(b) ("A person is concerned in the commission of a crime only if he: (1) [d]irectly commits the crime; (2) [i]ntentionally causes some other person to commit the crime under such circumstances that the other person is not guilty of any crime either in fact or because of legal incapacity; (3) [i]ntentionally aids or abets in the commission of the crime; or (4) [i]ntentionally advises, encourages, hires, counsels, or procures another to commit the crime.").

Hawaii: Haw. Rev. Stat. Ann. § 702-221(1) (LexisNexis 2003) ("A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both."); *id.* § 702-221(2) ("A person is legally accountable for the conduct of another person when * * * [h]e is an

accomplice of such other person in the commission of the offense."); *id.* § 702-222 ("A person is an accomplice of another person in the commission of an offense if[,] * * * [w]ith the intention of promoting or facilitating the commission of the offense, the person: (a) [s]olicits the other person to commit it; or (b) [a]ids or agrees or attempts to aid the other person in planning or committing it[.]").

Idaho: Idaho Code Ann. § 19-1430 (2004) ("The distinction between an accessory before the fact and a principal and between principals in the first and second degree, in cases of felony, is abrogated; and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, shall hereafter be prosecuted, tried, and punished as principals * * * .").

Illinois: 720 Ill. Comp. Stat. Ann. 5/5-1 (West 2002) ("A person is responsible for conduct which is an element of an offense if the conduct is either that of the person himself, or that of another and he is legally accountable for such conduct as provided in Section 5-2, or both."); *id.* at 5/5-2 ("A person is legally accountable for the conduct of another when[,] * * * [e]ither before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense.").

Indiana: Ind. Code Ann. § 35-41-2-4 (LexisNexis 2004) ("A person who knowingly or intentionally aids,

induces, or causes another person to commit an offense commits that offense * * * .").

Iowa: Iowa Code Ann. § 703.1 (West 2003) ("All persons concerned in the commission of a public offense, whether they directly commit the act constituting the offense or aid and abet its commission, shall be charged, tried and punished as principals.").

Kansas: Kan. Stat. Ann. § 21-3205(1) (1995) ("A person is criminally responsible for a crime committed by another if such person intentionally aids, abets, advises, hires, counsels or procures the other to commit the crime.").

Kentucky: Ky. Rev. Stat. Ann. § 502.020(1) (LexisNexis 1999) ("A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he: (a) [s]olicits, commands, or engages in a conspiracy with such other person to commit the offense; or (b) [a]ids, counsels, or attempts to aid such person in planning or committing the offense[.]").

Louisiana: La. Rev. Stat. Ann. § 14:24 (1997) ("All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals.").

Maine: Me. Rev. Stat. Ann. tit. 17-A, § 57(1) (2006) ("A person may be guilty of a crime if it is committed by the conduct of another person for which he is legally

accountable as provided in this section."); *id.* § 57(2) ("A person is legally accountable for the conduct of another person when * * * [h]e is an accomplice of such other person in the commission of the crime[.]"); *id.* § 57(3) ("A person is an accomplice of another person in the commission of a crime if[,] * * * [w]ith the intent of promoting or facilitating the commission of the crime, he solicits such other person to commit the crime, or aids or agrees to aid or attempts to aid such other person in planning or committing the crime.").

Maryland: Md. Code Ann., Crim. Proc. § 4-204(b) (LexisNexis 2001 & Supp. 2005) ("[T]he distinction between an accessory before the fact and a principal is abrogated; and * * * an accessory before the fact may be charged, tried, convicted, and sentenced as a principal.").

Massachusetts: Mass. Ann. Laws ch. 274, § 2 (LexisNexis 1992) ("Whoever aids in the commission of a felony, or is accessory thereto before the fact by counselling, hiring or otherwise procuring such felony to be committed, shall be punished in the manner provided for the punishment of the principal felon.").

Michigan: Mich. Comp. Laws Ann. § 767.39 (West 2000) ("Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.").

Minnesota: Minn. Stat. Ann. § 609.05 subdiv. 1 (West 2003) ("A person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime.").

Mississippi: Miss. Code Ann. § 97-1-3 (West 2005) ("Every person who shall be an accessory to any felony, before the fact, shall be deemed and considered a principal, and shall be indicted and punished as such[.]").

Missouri: Mo. Ann. Stat. § 562.036 (West 1999) ("A person with the required culpable mental state is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is criminally responsible, or both."); *id.* § 562.041(1) ("A person is criminally responsible for the conduct of another when[,] * * * [e]ither before or during the commission of an offense with the purpose of promoting the commission of an offense, he aids or agrees to aid or attempts to aid such other person in planning, committing or attempting to commit the offense.").

Montana: Mont. Code Ann. § 45-2-301 (2005) ("A person is responsible for conduct which is an element of an offense if the conduct is either that of the person himself or that of another and he is legally accountable for such conduct as provided in 45-2-302, or both."); *id.* § 45-2-302 ("A person is legally accountable for the conduct of another when[,] * * * either before or during the commission of an offense with the purpose to promote or facilitate such commission, he solicits, aids, abets, agrees, or attempts to aid such other person in the planning or commission of the offense.").

Nebraska: Neb. Rev. Stat. Ann. § 28-206 (LexisNexis 2003) ("A person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender.").

Nevada: Nev. Rev. Stat. Ann. § 195.020 (LexisNexis 2006) ("Every person concerned in the commission of a felony, gross misdemeanor or misdemeanor, whether he directly commits the act constituting the offense, or aids or abets in its commission, and whether present or absent; and every person who, directly or indirectly, counsels, encourages, hires, commands, induces or otherwise procures another to commit a felony, gross misdemeanor or misdemeanor is a principal, and shall be proceeded against and punished as such.").

New Hampshire: N.H. Rev. Stat. Ann. § 626:8(I) (LexisNexis Supp. 2005) ("A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both."); *id.* § 626:8(II) ("A person is legally accountable for the conduct of another person when * * * [h]e is an accomplice of such other person in the commission of the offense."); *id.* § 626:8(III) ("A person is an accomplice of another person in the commission of an offense if[,] * * * [w]ith the purpose of promoting or facilitating the commission of the offense, he solicits such other person in committing it, or aids or agrees or attempts to aid such other person in planning or committing it[.]").

New Jersey: N.J. Stat. Ann. § 2C:2-6(a) (West 2005) ("A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for

which he is legally accountable, or both."); *id.* § 2C:2-6(b) ("A person is legally accountable for the conduct of another person when * * * [h]e is an accomplice of such other person in the commission of an offense[.]"); id. § 2C:2-6(c) ("A person is an accomplice of another person in the commission of an offense if[,] * * * [w]ith the purpose of promoting or facilitating the commission of the offense[,] he * * * [s]olicits such other person to commit it; [or] * * * [a]ids or agrees or attempts to aid such other person in planning or committing it[.]").

New Mexico: N.M. Stat. § 30-1-13 (2004) ("A person may be charged with and convicted of the crime as an accessory if he procures, counsels, aids or abets in its commission and although he did not directly commit the crime * * * .").

New York: N.Y Penal Law § 20.00 (McKinney 2004) ("When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct.").

North Carolina: N.C. Gen. Stat. § 14-5.2 (2005) ("All distinctions between accessories before the fact and principals to the commission of a felony are abolished. Every person who heretofore would have been guilty as an accessory before the fact to any felony shall be guilty and punishable as a principal to that felony.").

North Dakota: N.D. Cent. Code § 12.1-03-01(1) (1997) ("A person may be convicted of an offense based

upon the conduct of another person when[,] * * * [a]cting with the kind of culpability required for the offense, he causes the other to engage in such conduct; [or] * * * [w]ith intent that an offense be committed, he commands, induces, procures, or aids the other to commit it[.]").

Ohio: Ohio Rev. Code Ann. § 2923.03(A) (LexisNexis 2006) ("No person, acting with the kind of culpability required for the commission of an offense, shall * * * [s]olicit or procure another to commit the offense; [or] * * * [a]id or abet another in committing the offense[.]."); *id.* § 2923.03(F) ("Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender.").

Oklahoma: Okla. Stat. Ann. tit. 21, § 172 (West 2002) ("All persons concerned in the commission of crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, are principals.").

Oregon: Or. Rev. Stat. § 161.150 (2005) ("A person is guilty of a crime if it is committed by the person's own conduct or by the conduct of another for which the person is criminally liable, or both."); *id.* § 161.155 ("A person is criminally liable for the conduct of another person constituting a crime if[,] * * * [w]ith the intent to promote or facilitate the commission of the crime[,] the person * * * [s]olicits or commands such other person to commit the crime; or * * * [a]ids or abets or agrees or

attempts to aid or abet such other person in planning or committing the crime[.]").

Pennsylvania: 18 Pa. Cons. Stat. Ann. § 306(a) (West 1998) ("A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both."); *id.* § 306(b) ("A person is legally accountable for the conduct of another person when * * * he is an accomplice of such other person in the commission of the offense."); *id.* § 306(c) ("A person is an accomplice of another person in the commission of an offense if[,] * * * with the intent of promoting or facilitating the commission of the offense, he * * * solicits such other person to commit it; or * * * aids or agrees or attempts to aid such other person in planning or committing it[.]").

Rhode Island: R.I. Gen. Laws § 11-1-3 (2002) ("Every person who shall aid, assist, abet, counsel, hire, command, or procure another to commit any crime or offense, shall be proceeded against as principal or as an accessory before the fact, according to the nature of the offense committed, and upon conviction shall suffer the like punishment as the principal offender is subject to * * * .").

South Carolina: S.C. Code. Ann. § 16-1-40 (2003) ("A person who aids in the commission of a felony or is an accessory before the fact in the commission of a felony by counseling, hiring, or otherwise procuring the felony to be committed is guilty of a felony and, upon conviction, must be punished in the manner prescribed for the punishment of the principal felon.").

South Dakota: S.D. Codified Laws § 22-3-3 (2005) ("Any person who, with the intent to promote or facilitate the commission of a crime, aids, abets, or advises another person in planning or committing the crime, is legally accountable, as a principal to the crime."); *id.* § 22-3-3.1 ("The distinction between an accessory before the fact and a principal, and between principals in the first and second degree, in cases of felony, is abrogated. Any person connected with the commission of a felony, whether that person directly commits the act constituting the offense or aids and abets its commission, though not present, shall be prosecuted, tried, and punished as a principal.").

Tennessee: Tenn. Code Ann. § 39-11-401(a) (2003) ("A person is criminally responsible as a party to an offense if the offense is committed by the person's own conduct, by the conduct of another for which the person is criminally responsible, or by both."); *id.* § 39-11-402 ("A person is criminally responsible for an offense committed by the conduct of another if[,] * * * [a]cting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense[.]").

Texas: Tex. Penal Code Ann. § 7.01(a) (Vernon 2003) ("A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both."); *id.* § 7.01(c) ("All traditional distinctions between accomplices and principals are abolished by this section, and each party to an offense may be charged and convicted without alleging that he acted as

a principal or accomplice."); *id.* § 7.02(a) ("A person is criminally responsible for an offense committed by the conduct of another if[,] * * * acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense[.]").

Utah: Utah Code Ann. § 76-2-202 (2003) ("Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.").

Vermont: Vt. Stat. Ann. tit. 13, § 3 (1998) ("A person who aids in the commission of a felony shall be punished as a principal."); *id.* § 4 ("A person who is accessory before the fact by counseling, hiring or otherwise procuring an offense to be committed may be * * * indicted, tried, convicted and punished as if he were a principal offender * * * .").

Virginia: Va. Code Ann. § 18.2-18 (2004) ("In the case of every felony, every principal in the second degree and every accessory before the fact may be indicted, tried, convicted and punished in all respects as if a principal in the first degree[.]").

Washington: Wash. Rev. Code Ann. § 9A.08.020(1) (West 2000) ("A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable."); *id.* § 9A.08.020(2) ("A person is legally accountable for the conduct of another person when * * * he is an accomplice of such other person in

the commission of the crime."); *id.* § 9A.08.020(3) ("A person is an accomplice of another person in the commission of a crime if[,] * * * [w]ith knowledge that it will promote or facilitate the commission of the crime, he (i) solicits, commands, encourages, or requests such other person to commit it; or (ii) aids or agrees to aid such other person in planning or committing it[.]").

West Virginia: W. Va. Code Ann. § 61-11-6 (LexisNexis 2005) ("In the case of every felony, every principal in the second degree, and every accessory before the fact, shall be punishable as if he were the principal in the first degree[.]").

Wisconsin: Wis. Stat. Ann. § 939.05(1) (West 2005) ("Whoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime although the person did not directly commit it * * * ."); *id.* § 939.05(2) ("A person is concerned in the commission of the crime if the person: (a) [d]irectly commits the crime; or (b) [i]ntentionally aids and abets the commission of it; or (c) * * * advises, hires, counsels or otherwise procures another to commit.").

Wyoming: Wyo. Stat. Ann. § 6-1-201(a) (2005) ("A person who knowingly aids or abets in the commission of a felony, or who counsels, encourages, hires, commands or procures a felony to be committed, is an accessory before the fact."); *id.* § 6-1-201(b) ("An accessory before the fact * * * [m]ay be indicted, * * * tried and convicted as if he were a principal; * * * [and] [u]pon conviction, is subject to the same punishment and penalties as are prescribed by law for the punishment of the principal.").

No. 05-1629

IN THE

Supreme Court of the United States

ALBERTO GONZALES, ATTORNEY GENERAL,
Petitioner,

v.

LUIS ALEXANDER DUENAS-ALVAREZ,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether a "theft offense," which is an "aggravated felony" under the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(G), includes aiding and abetting the commission of the offense.

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Petitioner,

v.

LUIS ALEXANDER DUENAS-ALVAREZ,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unreported. The decisions of the Board of Immigration Appeals (Pet. App. 3a) and the Immigration Judge (Pet. App. 4a-10a) are also unreported.

STATUTORY PROVISIONS INVOLVED

1. California Vehicle Code § 10851 provides in relevant part:

> Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, or any person who is a

> party or accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense and, upon conviction thereof, shall be punished by imprisonment in a county jail for not more than one year or in the state prison or by a fine of not more than five thousand dollars ($5,000), or by both the fine and imprisonment.

Cal. Veh. Code § 10851(a).

2. The Immigration and Nationality Act (INA), 8 U.S.C. § 1101(a)(43)(G), defines "aggravated felony" to include "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year."

STATEMENT

1. An alien deemed to be convicted of an "aggravated felony," 8 U.S.C. § 1101(a)(43), is subject to severe and wide-ranging consequences. Such an alien is subject to, *inter alia*, mandatory removal, *id.* §§ 1227(a)(2), 1229b(a) (barring discretionary relief from removal), and is permanently barred from returning to the United States, *id.* § 1182(a)(9)(A)(i). Among the offenses that qualify as aggravated felonies are "theft offense[s] (including receipt of stolen property) . . . ." *Id.* § 1101(a)(43)(G).

Taylor v. *United States*, 495 U.S. 575, 599-602 (1990) sets forth the two-part test that courts apply to determine whether a conviction under a particular statute qualifies as a conviction for the relevant offense under the INA. The first step—the "categorical" approach—asks whether all conduct covered by the statute of conviction falls within the "generic" definition of the relevant offense (*i.e.*, "the generic sense in which the term is now used in the criminal codes of most States," *id.* at 598). If it does, then the conviction qualifies categorically as an aggravated felony. If the statute of conviction is broader, however, then the court moves on to the second step—the "modified categorical" approach. Under this step, the court reviews certain documents in the record to determine whether the particular offense of which

the defendant was convicted falls within the scope of the generic definition. *Id.* at 602.

2. Luis Duenas-Alvarez, a native and citizen of Peru, became a lawful permanent resident of the United States in 1998. In 2004, the Department of Homeland Security initiated removal proceedings charging Duenas-Alvarez with removability based, *inter alia*, on his conviction for an alleged aggravated felony, namely a "theft offense." At issue was Duenas-Alvarez's 2002 conviction, pursuant to a guilty plea, under California Vehicle Code § 10851.

3. California Vehicle Code § 10851(a) outlaws the taking or driving of a vehicle "without the consent of the owner" and "with intent either to permanently or temporarily deprive the owner thereof of . . . title to or possession of the vehicle, whether with or without intent to steal." The inclusion of temporary takings and liability without the intent to steal means that § 10851 covers what is typically referred to as "joyriding." It also explicitly includes liability for an "accessory," which is defined under California law to be an accessory after the fact. Cal. Penal Code § 32. Section 10851 has been interpreted as proscribing a variety of conduct. *See generally People* v. *Garza*, 111 P.3d 310, 315 (Cal. 2005).

The scope and application of California Vehicle Code § 10851 is aptly demonstrated when it is placed in the context of the California Penal Code's theft statutes—the general theft statute, Cal. Penal Code § 484(a), and the grand theft statute, § 487(d). Section 484(a) states that any person who, *inter alia*, "feloniously steal[s], take[s], . . . lead[s], or drive[s] away the personal property of another . . . is guilty of theft." Section 487(d) in turn provides that the taking of an automobile, of whatever value, constitutes "grand theft." A joyrider could not be convicted under these statutes, as he would lack the requisite intent. *See, e.g., People* v. *Davis*, 965 P.2d 1165, 1167-1168 (Cal. 1998). And, unlike § 10851, these statutes do not include liability for accessories after the fact.

4. The Immigration Judge in Duenas-Alvarez's removal proceeding determined that California Vehicle Code § 10851 was a categorical theft offense under the first step of the *Taylor* analysis. Pet. App. 9a. The Board of Immigration Appeals affirmed. *Id.* at 3a. Duenas-Alvarez petitioned for review in the Ninth Circuit.

5. While the petition was pending, the Ninth Circuit decided *Penuliar* v. *Ashcroft*, 395 F.3d 1037 (2005), *amended*, 435 F.3d 961 (9th. Cir.), *petition for cert. filed*, 75 U.S.L.W. 3001 (June 22, 2006) (No. 05-1630). In that case, the Ninth Circuit concluded that California Vehicle Code § 10851 was not a categorical "theft offense" under *Taylor* because it imposed broader liability than a generic "theft offense." 395 F.3d at 1044-1045. Specifically, the court noted that the statute expressly includes liability for accessories. *Id.* at 1044.

6. In light of its decision in *Penuliar*, the Ninth Circuit granted Duenas-Alvarez's petition: "As the government notes, we recently held that a violation of section 10851(a) does not categorically qualify as a theft offense because that section is broader than the generic definition of a theft offense" under the INA. Pet. App. 2a. As requested by the Government, the court remanded Duenas-Alvarez's case to the BIA for further proceedings. *Id.*

SUMMARY OF ARGUMENT

Initially, the Government asked the Court to decide a phantom question. It urged the Court to reject language used in the Ninth Circuit's *Penuliar* opinion that could possibly—but should not—be read contrary to the Government's view of the question presented. But "this Court reviews judgments, not opinions." *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); *Bowen* v. *American Hosp. Ass'n*, 476 U.S. 610, 625-626 n.11 (1986); *see also Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 823 (1985) (Stevens, J., concurring in part and dissenting in part) ("Our job, however, is to review judgments, not to edit opinions."). Because this Court "is not bound to en-

counter phantoms," the proper question is "was the judgment correct." *McClung* v. *Silliman*, 19 U.S. (6 Wheat.) 598, 603 (1821) (emphasis omitted).

In recognition of these principles, the Government's brief acknowledges the actual dispute between the parties: whether California Vehicle Code § 10851 is categorically a "theft offense" under the INA. *See* Gov't Br. III, 9, 27-30.

Under *Taylor* v. *United States*, 495 U.S. 575, 598-602 (1990), the answer is clearly no. Pursuant to *Taylor*'s "categorical" approach, the question is whether all conduct covered by the statute of conviction falls within the "generic" definition of the relevant offense, *i.e.*, "the generic sense in which the term is now used in the criminal codes of most States." *Id.* at 598. California Vehicle Code § 10851 is broader than the generic definition of "theft offense" for multiple reasons, any one of which suffices as a ground for affirmance.

First, California Vehicle Code § 10851 is not a categorical "theft offense" because it includes liability for accessories after the fact (those who assist the principal *after* the completion of the crime). In its brief, the Government concedes that accessory after the fact liability is beyond the scope of the generic definition of "theft offense" and, therefore, that if § 10851 reaches accessories after the fact, then it is not a categorical theft offense. The only dispute, then, concerns whether this particular statute—§ 10851—reaches accessories after the fact. The Government's feeble protestations notwithstanding, the statute plainly does so. The statute itself explicitly includes liability for an "accessory," and California statutes and case law make plain that "accessory" means "accessory after the fact."

Second, California Vehicle Code § 10851 is not a categorical "theft offense" due to the broad sweep of aiding and abetting liability in California. While Respondent does not dispute that, as a general matter, aiding and abetting liability is included in the generic definition of a crime, that does not resolve this case, which involves *California* aiding and abetting liability. California takes an especially broad ap-

proach to aiding and abetting liability; it is one of a minority of states that apply the disfavored "natural and probable consequences" doctrine. Pursuant to this doctrine, one guilty as an aider and abettor of one crime may be held liable for a *second* crime so long as the second crime is the natural and probable consequence of the original crime that he aided and abetted. Because California's expansive aiding and abetting liability is broader than the approach in the majority of states, § 10851 covers conduct beyond the generic definition of "theft offense" for this reason as well.

Third, California Vehicle Code § 10851 is not a categorical "theft offense" because it does not require the prosecutor to prove the mens rea necessary for theft. In fact, the statute specifically negates the intent commonly associated with larceny—an intent to steal—as it states that one is liable under § 10851 "with or without intent to steal." Section 10851 draws within its broad scope the offense commonly known as "joyriding," and permits conviction of an individual who took a vehicle intending only to use it for a brief time and return it. At common law and today, a more culpable mens rea is required to constitute a theft offense. Thus, the minimal showing of intent required by § 10851 also warrants the conclusion that the provision is not a categorical "theft offense."

Although the Court is in a position to address any arguments regarding the first step of *Taylor*—whether § 10851 is a categorical "theft offense"—the Court should not reach beyond that analysis to the second step of *Taylor*, the modified categorical approach. The Ninth Circuit addressed the categorical question alone and remanded to the BIA for additional consideration under the modified approach. This Court should take the same approach and remand the case to the agency for consideration of the modified approach in the first instance. Regardless, however, the modified categorical inquiry does not support the Government's view; the documents the Government relies on fail to demonstrate that Respondent was in fact convicted of a "theft offense" as generically defined.

ARGUMENT

I. CALIFORNIA VEHICLE CODE § 10851 COVERS ACCESSORIES AFTER THE FACT AND, THEREFORE, EXCEEDS THE GENERIC DEFINITION OF "THEFT OFFENSE"

The Government concedes, as it must, that "[i]f Section 10851(a) reaches accessories after the fact, . . . a violation of the statute is not a theft offense as a 'categorical' matter." Gov't Br. 29 (footnote omitted); *see also id.* at 9. The only question, then, is whether California Vehicle Code § 10851 reaches accessories after the fact. Because it clearly does so, § 10851 is not a categorical "theft offense" under the INA.

A. Accessories After the Fact Are Beyond The Scope Of The Generic Definition Of A Theft Offense

At common law, there were four main parties to a crime: (1) "principal in the first degree"; (2) "principal in the second degree," also known as an aider and abettor present; (3) "accessory before the fact," also known as an aider and abettor not present; and (4) "accessory after the fact." 2 Wayne R. LaFave, *Substantive Criminal Law* § 13.1 (2d ed. 2003); *see also* 4 William Blackstone, *Commentaries*, at 34-40. In brief, the principal in the first degree is the actor who engages in the criminal act (2 LaFave § 13.1(a)); principals in the second degree are present at the crime and "aid, counsel, command, or encourage the principal in the first degree in the commission of that offense" (*id.* § 13.1(b)); the accessory before the fact is not present at the crime but "orders, counsels, encourages, or otherwise aids and abets another to commit a felony" (*id.* § 13.1(c)); and the accessory after the fact offers assistance to the principal after the crime is complete (*id.* § 13.1).

Modern penal codes have done away with the distinctions among the first three categories. Principals and aiders and abettors (present and not present) "have all played a part in the commission of the crime and are quite appropriately held accountable for its commission." 2 LaFave § 13.6(a).

By contrast, the category of accessory after the fact has not been collapsed with the others. *See* 2 LaFave § 13.6(a); *see also* Gov't Br. 11-12 & n.3. An accessory after the fact "had no part in causing the crime" and is "not deemed a participant in the felony." 2 LaFave §§ 13.6(a), 13.1. Instead, the offense of the accessory after the fact is considered to be "that of interfering with the processes of justice and is best dealt with in those terms." *Id.* § 13.6(a).

In fact, in all fifty states and the District of Columbia, an accessory after the fact is not liable for an offense as a principal. Br. in Opp. 17-24. Thus, and as the Government concedes, it is clear that a statute that reaches accessories after the fact is beyond the generic definition of a "theft offense." *See* Gov't Br. 9, 29; *see also Taylor*, 495 U.S. at 598.[1]

B. Section 10851 Reaches Accessories After The Fact

The only question, then, is whether California Vehicle Code § 10851 covers accessories after the fact. The plain language of the statute explicitly reaches the conduct of an "accessory." And under California law, that term refers to an accessory after the fact.

Provisions in the California Penal Code dating back to 1872 establish that the term "accessory" means accessory

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[1] Respondent raised this argument below. Starting with the IJ, Respondent argued, *inter alia*, that because § 10851 includes liability for "a party, accessory or accomplice" in the "driving or . . . taking" of a vehicle, it exceeds the scope of the generic definition of "theft offense." Pet. App. 29a-30a. Respondent further confirmed that his argument was based in part on the inclusion of liability for accessories by arguing that his conviction was not for a "theft offense" under the modified approach because "Respondent may have been convicted as 'a party, accessory or accomplice.'" *Id.* at 30a. Later, proceeding pro se before the Ninth Circuit, Respondent again stressed the point that § 10851 includes liability for accessories. *See* Pet.-Appellant's Substitute Opening Br., No. 04-74471, at 14. Moreover, the Ninth Circuit understood the accessory argument to be properly before it—as explained in Part I.B. *infra*, California Vehicle Code § 10851's liability for accessories formed the basis for the court's decision.

after the fact as a matter of California law. Section 30, entitled "Classification of Parties to Crime," breaks the parties to a crime down into two categories: "The parties to crimes are classified as: (1) Principals; and, (2) Accessories." Cal. Penal Code § 30. The sections that follow—§ 31 and § 32—pertain to these two classifications respectively. Most notably for present purposes, § 32, which is entitled "Accessories defined," establishes that an "accessory" is one who assists a principal *after* a crime has been committed.[2] The conduct covered by § 32 is that of an accessory after the fact. *See generally* 2 LaFave § 13.6(a); *see also* Gov't Br. 28 ("As used in Section 32 of the Penal Code, . . . an 'accessory' is an accessory after the fact."). The section of the Penal Code immediately following sets forth the relevant punishment for "accessories," *i.e.*, accessories after the fact. Cal. Penal Code § 33.[3]

Significantly, contemporaneous with the enactment of §§ 30-33 of the Penal Code, California abrogated the distinction between principals in the first and second degree and accessories before the fact. *See* Cal. Penal Code § 971 ("The distinction between an accessory before the fact and a principal, and between principals in the first and second degree is abrogated . . . .").

Thus, the term "accessory *before* the fact" has not been a relevant category under California law since 1872. *See People* v. *Collum*, 54 P. 589, 590 (Cal. 1898) ("[I]n this state an access[o]ry before the fact is not recognized."); *see also infra* n.7. As a result, common law "accessories after the

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[2] California Penal Code § 32 provides:

> Every person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony.

[3] Section 31 sets forth those liable as principals, a group that includes aiders and abettors.

fact" became known simply as "accessories." *See, e.g.*, *Collum*, 54 P. at 590 (using the term "accessory" to reference an accessory after the fact); *Ex parte Goldman*, 88 P. 819, 820-821 (Cal. Dist. Ct. App. 1906) (same). By 1923, when the precursor to California Vehicle Code § 10851 first included liability for an "accessory,"[4] the term "accessory" had an established meaning under California law.[5]

Notwithstanding the unambiguous state of the law, the Government makes a handful of assertions aimed at undermining the conclusion that California Vehicle Code § 10851 includes liability for accessories after the fact. Gov't Br. 29. None of these arguments is availing.

The Government's main contention is that California Penal Code § 32 does not "provide a definition of a term" but, rather, merely "describes an offense." Gov't Br. 29. This assertion is curious in light of the title of § 32: "Accessories defined." Moreover, the legislature and the courts have long understood § 32 as defining the term "accessory." *See, e.g.*, 1935 Cal. Stat. 1484 (passing "An act to amend section 32 of the Penal Code, *relating to the definition of an accessory*" (emphasis added)).[6]

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[4] The predecessor to § 10851 was first passed in 1913. That provision stated: "Any person who shall drive or operate, or cause to be driven or operated . . . any motor vehicle not his own, with or without intent to steal the same, in the absence of the owner thereof, and without such owner's consent shall be guilty of a felony . . . ." 1913 Cal. Stat. 651. In 1923 that provision was amended to include liability for an "accessory." 1923 Cal. Stat. 564. It provided in relevant part that "[a]ny person who assists in, or is a party or accessory to or an accomplice in, any such stealing or unauthorized taking or driving, shall also be deemed guilty of a felony." *Id.*

[5] Case law in the ensuing years confirms this point. *See, e.g.*, *People* v. *Mitten*, 112 Cal. Rptr. 713, 715 (Cal. Ct. App. 1974) ("[O]ne who would formerly have been an 'accessory after the fact' is now guilty as an accessory."); *People* v. *Celis*, 46 Cal. Rptr. 3d 139, 142-144 (Cal. Ct. App. 2006) (observing that "[s]ection 32 defines 'accessory' as . . . ." and using the term "accessory" to refer to an accessory after the fact).

[6] The term "accessory" appears in a handful of California statutes, and all of these provisions are consistent with "accessory" having the meaning of "accessory after the fact." As noted, the term "accessory"

Significantly, although the Government argues that "accessory" in California Vehicle Code § 10851 should not be read to mean "accessory after the fact," it has failed to suggest *any* meaning of the term. As a general matter, there can be only three possible meanings of "accessory": (1) that it refers to an accessory *before* the fact; (2) that it refers to an accessory *after* the fact; or (3) that it refers to *both* accessories before the fact and after the fact. *See, e.g.*, 4 Blackstone at 34-40. Under options (2) and (3) Respondent prevails; for as the Government concedes, if the statute reaches accessories after the fact, it is broader than the generic definition of "theft offense." Gov't Br. 9, 29. Thus, for the Government to prevail, "accessory" in § 10851 must refer *only* to an accessory *before* the fact. In light of the fact that "an access[o]ry before the fact is not recognized" under California law, *Collum*, 54 P. at 590,[7] that argument is untenable.

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appears in Cal. Penal Code §§ 30-33, 971 in a manner consistent with its definition as accessory after the fact. Other than those statutes and California Vehicle Code § 10851, the term is used in only five statutory provisions: Cal. Penal Code § 499d, Cal. Veh. Code § 10851.5, Cal. Penal Code § 791, Cal. Penal Code § 972, and Cal. Health & Safety Code § 12607. Section 499d, entitled "Aircraft; taking without owner's consent," and § 10851.5, pertaining to theft of binder chains, are both drafted comparably to § 10851, including establishing liability for "any person who is a party or accessory to or an accomplice in . . . ." Cal. Penal Code § 499d, Cal. Veh. Code § 10851.5. Section 791 is entitled "Accessory" and describes the court with jurisdiction over the "accessory" "as defined in § 32." Section 972 provides for the prosecution of the "accessory" without regard to the prosecution of the principal, and directly follows § 971. Section 12607 provides that the State Fire Marshal may deny a license to anyone "who has been convicted as a principal or accessory in a crime against property involving arson." In both of these provisions the use of "principal" and "accessory" demonstrates that "accessory" must mean accessory after the fact rather than aider or abettor because, under California Penal Code § 971, the distinctions between aiders and abettors and principals are abolished.

[7] *See also, e.g.*, *People* v. *Magee*, 31 Cal. Rptr. 658, 681 (Cal. Dist. Ct. App. 1963) ("[T]here are no accessories before the fact . . . in California." (citation omitted)); *People* v. *Wallace*, 178 P.2d 771, 784 (Cal. Dist. Ct. App. 1947) ("[T]he offense at common law known as 'accessory before the fact' is not known to the law of California."); *People* v. *King*, 85 P.2d 928,

The Government is left to argue that the term "accessory" in California Vehicle Code § 10851 has no meaning whatsoever. It proposes reading the language "an accessory to or an accomplice in" in § 10851 as merely "shorthand for aider and abettor." Gov't Br. 29. This argument violates basic principles of statutory interpretation. In California, the term "accomplice" is a defined term, and encompasses principals and aiders and abettors. *See* Cal. Penal Code § 1111; *see also* 1 Witkin & Epstein, Introduction to Crimes § 77.[8] Because the plain language of § 10851 establishes liability for an "accomplice" *or* an "accessory," these terms should be given independent meaning. *See, e.g., Houge* v. *Ford*, 285 P.2d 257, 260 (Cal. 1955).[9] According the two terms different meanings is also consistent with the basic rule of statutory interpretation that "[i]nterpretive constructions which render some words surplusage . . . are to be avoided." *California Mfrs. Ass'n* v. *Public Util. Comm'n*, 598 P.2d 836, 840 (Cal. 1979).[10] Because "accomplice" already includes principals and aiders and abettors, the term "accessory" must pertain to something else.[11] And the authority

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939 (Cal. Dist. Ct. App. 1938) ("One who would have been an accessory before the fact at common law is triable and punishable as a principal under our statutes, . . . there now being no such offense as accessory before the fact."); 1 B.E. Witkin & Norman L. Epstein, *California Criminal Law*, Introduction to Crimes § 77 (3d ed. 2000) (Witkin & Epstein) ("[T]here are neither accessories before the fact nor second degree principals in California.").

[8] In more general usage, the term "accomplice" refers to aiders and abettors. *See, e.g.*, 2 LaFave § 13.2.

[9] *Cf. Garcia* v. *United States*, 469 U.S. 70, 73 (1984) ("Canons of construction indicate that terms connected in the disjunctive in this manner [*i.e.*, separated by "or"] be given separate meanings.").

[10] *Cf. Freytag* v. *Commissioner*, 501 U.S. 868, 877 (1991) (statutory interpretations that "render superfluous other provisions in the same enactment" are strongly disfavored (citation omitted)).

[11] Indeed, California cases have long recognized this distinction. *Collum*, 54 P. at 590 (distinguishing "accomplice" from "accessory"); *cf. People* v. *Felton*, 18 Cal. Rptr. 3d 626, 632 (Cal. Ct. App. 2004) (distin-

the Government cites to support reading the entire statutory phrase as "shorthand" for aiding and abetting is inapposite: *People* v. *Clark*, 60 Cal. Rptr. 58 (Cal. Ct. App. 1967), an intermediate appellate case, in no way purported to define "accessory" or the requirements for liability as an "accessory" under § 10851; rather, as the facts reveal, the case only involved whether the defendant could be held liable under an *accomplice* theory. *See id.* at 62.[12]

Where, as here, there is no ambiguity in the meaning of "accessory," California Vehicle Code § 10851 must be interpreted to provide liability for accessories after the fact. *People* v. *Coronado*, 906 P.2d 1232, 1234 (Cal. 1995) ("If there is no ambiguity in the language of the statute, then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs . . . courts will not interpret away clear language in favor of an ambiguity that does not exist." (citations omitted)).[13]

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guishing accomplices, *i.e.*, those liable as principal, from accessories after the fact).

[12] *Clark* addressed whether evidence that an individual was found riding in the passenger seat of a stolen car was sufficient to convict him under California Vehicle Code § 10851. The court held that there was no evidence that he was anything but an "innocent passenger" and, therefore, that there could be no liability. *Clark*, 60 Cal. Rptr. at 62. There is no suggestion that the Court considered whether the passenger might have been an accessory after the fact. Indeed, the facts of the case—a passenger found riding in a stolen car—are necessarily inconsistent with accessory after the fact liability; the circumstances entailed an ongoing crime under § 10851, which criminalizes not only "taking" but also "driving." *People* v. *Garza*, 111 P.3d 310, 315 (Cal. 2005) (observing that § 10851 criminalizes both the "taking" of a vehicle and the "posttheft driving" of a vehicle). Accessories after the fact become involved only after a felony is complete. *See* Cal. Penal Code § 32; *People* v. *Montoya*, 874 P.2d 903, 909 (Cal. 1994); *Collum*, 54 P. at 590.

[13] The Government also cites "legislative history" in support of its view that "accessory" under § 10851 does not mean accessory after the fact. Gov't Br. 30 n.17. But the source that the Government relies upon is, curiously, the legislative history of a *different* statute, namely § 499b(b) of the California Penal Code, which pertains to joyriding of "vessels." *See* S. Comm. on Public Safety, B. Analysis of Assemb. B. 928 (2003-2004 Reg.

In such circumstances—and as the Government concedes—California Vehicle Code § 10851 exceeds the scope of the generic definition of "theft offense."[14] As a result, a con-

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Sess.), July 8, 2003 at B-C & n.1. And the statement itself is merely a tentative opinion on the meaning of a case in the intermediate California appellate court, *Clark*, 60 Cal. Rptr. 58. *See supra* n.12.

As an initial matter, the relevant discussion in the legislative history is a footnote "hung" off the word "accomplice" (*not* "accessory")—again supporting the notion that *Clark* only pertains to "accomplice" liability. And the discussion is tentative on its face, stating only that appellate cases "appear to require" an aiding and abetting standard for accomplice liability under the statute.

More importantly, this legislative history is weak support indeed. This Court has "recogn[ized] that only the most extraordinary showing of contrary intentions from [legislative history] would justify a limitation on the 'plain meaning' of statutory language." *Garcia*, 469 U.S. at 75. Here, the meaning of "accessory" under § 10851 is made clear by statute. A statement in the legislative history of a different statute, that merely interprets case law, and coming some eighty years after the term "accessory" was first used in the precursor to § 10851 is hardly sufficient to disturb the plain meaning of "accessory" within § 10851.

[14] In fact, the judgment in *Penuliar* appears to have rested on the fact that California Vehicle Code § 10851 expressly includes liability for accessories after the fact. Section 10851, as the court noted, includes liability for "'a *party or an accessory to or an accomplice* in the driving or unauthorized taking or stealing.'" *Penuliar*, 435 F.3d at 970 (quoting Cal. Veh. Code § 10851 (emphasis in original)). The court then repeated, "[a]s the statute makes plain, California Vehicle Code § 10851(a) includes accessory or accomplice liability." *Id.* Thus, the court concluded that § 10851 "does not categorically qualify as a 'theft offense' within the meaning of 8 U.S.C. § 1101(a)(43)(G)." *Id.* The repeated references to § 10851's inclusion of liability for accessories and the fact that the term is clearly defined under California law suggest that accessory liability was the basis of the decision. Furthermore, at least one of the judges on the *Penuliar* panel has subsequently explained that *Penuliar*'s holding pertains to accessory liability. *See United States* v. *Vidal*, 426 F.3d 1011, 1018-1019 (2005) (Browning, J., concurring in part and dissenting in part), *reh'g en banc granted*, 453 F.3d 1114 (9th Cir. 2006) (explaining that "accessory" means accessory after the fact under California law, observing the inclusion of accessory after the fact liability under § 10851, and indicating this was the basis for the *Penuliar* holding). The fact that *Penuliar* is properly read as resting on accessory after the fact liability provides another indication

viction under § 10851 is not categorically a "theft offense." *See Taylor*, 495 U.S. at 598-600.[15]

II. CALIFORNIA AIDING AND ABETTING LIABILITY IS BEYOND THE SCOPE OF THE GENERIC DEFINITION OF "THEFT OFFENSE" BECAUSE IT INCLUDES THE NATURAL AND PROBABLE CONSEQUENCES DOCTRINE

The Government argues that aiding and abetting liability is included within the generic definition of "theft offense" because all states hold aiders and abettors liable for the underlying crime. This assertion, however, does not resolve the categorical inquiry into whether the scope of liability under California Vehicle Code § 10851 is broader than the generic definition of "theft offense." The answer to this question necessarily depends on the scope of *California* aiding and abetting liability. Because California aiding and abetting liability includes the "natural and probable consequences doctrine," liability under § 10851 reaches conduct beyond that covered by the aiding and abetting principles in the Model Penal Code and the majority of states. As such, § 10851 exceeds the scope of the generic definition of "theft offense." *See Scheidler* v. *National Org. for Women, Inc.*, 537 U.S. 393, 410 (2003) (examining "the Model Penal Code and a majority of States" to determine generic offense).[16]

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that the Government's question presented seeks a purely advisory opinion.

[15] An affirmance on this ground would have little practical impact. Ordinarily, accessories after the fact are not liable for the underlying crime. A determination that § 10851 exceeds the scope of the generic definition of "theft offense" because it includes liability for accessories after the fact will be relevant only to the exceptional statute, such as § 10851, that explicitly includes liability for accessories after the fact. *Cf.* Gov't Br. 29 n.16 (recognizing the narrowness of a holding on this ground).

[16] This argument plainly falls within the scope of the question presented. The Government sought review on whether aiding and abetting liability is within the scope of the generic definition of "theft offense." As the Brief in Opposition (at 16) observed, the only aiding and abetting liability that is relevant to the disposition of this case is California aiding and abetting liability; thus any consideration of whether aiding and abet-

A. The Requirements of Aiding And Abetting Liability

As a general matter, there are two basic elements of aiding and abetting liability—an act (some effort at facilitation or encouragement), and an intent to aid in the commission of the crime. *See, e.g.*, 2 LaFave § 13.2; *Hicks* v. *United States*, 150 U.S. 442, 449 (1893).

The act requirement demands that an aider and abettor provide assistance or encouragement for the criminal act. *See generally* 2 LaFave § 13.2(a). The aider and abettor is not required to commit the act that produces the criminal result. *See, e.g., Nye & Nissen* v. *United States*, 336 U.S. 613, 618-619 (1949) (aider and abettor "is as responsible for that act as if he committed it directly"). Moreover, the promotion or facilitation of the criminal act need not be substantial.[17] Indeed, the de minimis nature of the act requirement has led some commentators to observe that "the mental state is really what defines the aider and abettor." Baruch Weiss, *What Were They Thinking?: The Mental States of The Aider And Abettor And the Causer Under Federal Law*, 70 Fordham L. Rev. 1341, 1347-1348 (2002).

With respect to the intent required of an aider and abettor, the prevailing view stems from Judge Learned Hand's decision in *United States* v. *Peoni*, 100 F.2d 401 (2d Cir. 1938). Judge Hand held that the aider and abettor must "in some sort associate himself with the venture, . . . participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed." *Id.* at 402. In other words, the aider and abettor must have a "purposive attitude towards" the crime. *Id.* This Court approved of this approach in *Nye & Nissen*, 336 U.S. at 619. *See also* Weiss,

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ting liability is included in the generic definition of "theft offense" must be tethered to California's aiding and abetting liability.

[17] *See, e.g., United States* v. *Whitney*, 229 F.3d 1296, 1303 (10th Cir. 2000) ("[T]he level of participation may be of relatively slight moment." (quotation omitted)); *United States* v. *Taylor*, 226 F.3d 593, 597 (7th Cir. 2000) (finding that it "does not take much to satisfy" the facilitation requirement (quotation omitted)).

70 Fordham L. Rev. at 1350-1351 & nn.27-40 (noting the acceptance of the *Peoni* rule and speculating that the number of court decisions adopting the rule must be in excess of one thousand).[18]

B. California's Natural And Probable Consequences Doctrine Liability Reflects A Minority View Of Aiding And Abetting Liability

California takes a particularly broad view of aiding and abetting liability by incorporating the "natural and probable consequences doctrine." Under this doctrine, an aider and abettor may be held liable not only for the target crime but also for a *second* crime so long as the second crime is the natural and probable consequence of the original crime that he aided and abetted. *See generally* 1 Witkin & Epstein, Introduction to Crimes § 82. This doctrine is applied in a minority of states and, in fact, faces growing opposition in light of the fact that it is inconsistent with basic criminal justice principles. California's use of aiding and abetting liability pursuant to the natural and probable consequences doctrine thus means that California Vehicle Code § 10851 criminalizes

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[18] A variation on this view is reflected in the Model Penal Code, which states that an accomplice must have "the purpose of promoting or facilitating the commission of the offense." MPC § 2.06(3)(a). The Model Penal Code also provides that:

> [W]hen causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.

MPC § 2.06(4). The Commentaries explain that "[t]his formulation combines the policy that accomplices are equally accountable within the range of their complicity with the policies underlying those crimes defined according to results." Model Penal Code and Commentaries (Official Draft and Revised Comments) (MPC Commentaries) Pt. I, vol. 1, at 321 (1985).

There are some distinctions among the states as to the precise contours of the intent requirement for an aider and abettor, but all impose some requirement of intent that is directed at the particular target crime. *See generally* 2 LaFave § 13.2.

conduct that is beyond the scope of "theft offense" as generically defined. As such, a conviction under § 10851 is not categorically a theft offense. *See Taylor*, 495 U.S. at 598-600.[19]

1. California's Natural And Probable Consequences Doctrine

Under California's natural and probable consequences doctrine, an aider and abettor is liable not only for the offense that is aided and abetted—the target offense—but also for the "natural and probable consequences" of the offense that he "knowingly and intentionally aids and encourages." *People* v. *Beeman*, 674 P.2d 1318, 1326 (Cal. 1984); *see also People* v. *Prettyman*, 926 P.2d 1013, 1020-1021 (Cal. 1996). In other words, pursuant to the natural and probable consequences doctrine, liability does not stop with the crime that was actually aided and abetted.

This has serious consequences for mens rea requirements—which are the crux of aiding and abetting liability. *See supra* Part II.A. As the California Supreme Court observed in *People* v. *Croy*, 710 P.2d 392, 398 n.5 (Cal. 1985) (en

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[19] There is a strong argument that, to the extent that the Ninth Circuit's holding in *Penuliar* concerned aiding and abetting liability, it related to the particular scope of aiding and abetting liability *under California law*. *Penuliar* observed that in *United States* v. *Corona-Sanchez*, 291 F.3d 1201, 1208 (9th Cir. 2002) (en banc), *superseded by statute as stated in United States* v. *Vidal*, 426 F.3d 1011, 1018-1019 (2005), *reh'g en banc granted*, 453 F.3d 1114 (9th Cir. 2006), which determined that California's general theft statute was not a categorical "theft offense," the court "relied in part on the broad nature of aiding and abetting liability under California law." 435 F.3d at 969. *Penuliar* then cited *People* v. *Beeman*, 674 P.2d 1318, 1325-1326 (Cal. 1984), a case also cited by *Corona-Sanchez*. The pages of *Beeman* referenced in these opinions address the broad scope of aiding and abetting liability in light of, *inter alia*, the natural and probable consequences doctrine. *See Beeman*, 674 P.2d at 1325-1326 (stating that "the liability of an aider and abettor extends" to the natural and probable consequences of the target crime). Moreover, the judgment is well supported on this ground. Accordingly, to the extent that *Penuliar* concerns aiding and abetting liability, it relates to the particularly broad scope of aiding and abetting liability under California law.

banc), *disapproved of on other grounds by People* v. *Dyer*, 753 P.2d 1 (Cal. 1988), the natural and probable consequences doctrine permits liability for *unintended* crimes: "a defendant whose liability is predicated on his status as an aider and abettor need not have intended to encourage or facilitate the particular offense ultimately committed by the perpetrator." *See also People* v. *McCoy*, 24 P.3d 1210, 1214 (Cal. 2001) (observing that the natural and probable consequences doctrine is an exception to the rule that the aider and abettor must be as culpable as the actual perpetrator).

California applies the natural and probable consequences doctrine extremely broadly. For example, in *People* v. *Nguyen*, 26 Cal. Rptr. 2d 323 (Cal. Ct. App. 1993), one who aided and abetted a robbery was convicted for sex offenses—not withstanding that his only intent was to aid the robbery—based on the natural and probable consequence doctrine. In *People* v. *Simpson*, 152 P.2d 339, 344 (Cal. Ct. App. 1944), the court found that one who intended to aid and abet a robbery could be held liable for unplanned kidnapping as a natural and probable consequence of robbery. And *People* v. *Montes*, 88 Cal. Rptr. 2d 482 (Cal. Ct. App. 1999), held that the defendant was guilty of attempted murder as the natural and probable consequence of simple assault or breach of the peace.

As these cases demonstrate, the natural and probable consequences doctrine can be relied upon to create expansive liability that is unhinged from traditional mens rea requirements. It is not limited to circumstances in which the principal also lacks an intent element with regard to the particular criminal result—such as felony murder, transferred intent, or crimes based on negligence or recklessness. Nor is it limited to conspiracy cases. Indeed, it is not even limited to crimes that are necessary to carry out the predicate crime or to circumstances where the predicate crime is a felony.

2. California's Natural And Probable Consequences Doctrine Is Not Within The Generic Definition Of "Theft Offense"

In order for liability under California Vehicle Code § 10851 to qualify as a categorical "theft offense," California's natural and probable consequences doctrine of aiding and abetting liability must fall within the scope of the generic definition. California's sweeping approach to aiding and abetting liability under the natural and probable consequences doctrine, however, does not qualify under this standard: It has been rejected by the Model Penal Code and it is not applied by a majority of states. *See Scheidler*, 537 U.S. at 410 (examining "the Model Penal Code and a majority of States" to determine generic offense); *Taylor*, 495 U.S. at 598-599 & n.8.[20]

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[20] The Government argued in the Reply to the Brief in Opposition to its Petition for Writ of Certiorari in *Gonzales* v. *Penuliar*, No. 05-1630, that LaFave stated that the natural and probable consequences doctrine was an "established rule." *Penuliar* Reply Br. 3. The Government apparently relied on this proposition to rebut the argument that the natural and probable consequences rule is the minority view. This argument fails for several reasons. First, LaFave's description of the rule as "established" does not mean it is the *predominant* view; Respondent does not dispute that the rule exists (though it is on the wane). Further, the quote in context is far more easily read as setting forth the established rule of natural and probable consequences—how the rule has come to be understood—rather than suggesting it is the prevailing view. Indeed, LaFave's other analysis indicates that the majority view does not embrace natural and probable consequences liability for aiders and abettors, requiring a closer connection to the crime both in terms of conduct and intent. *See, e.g.*, 2 LaFave § 13.2(c) ("The prevailing view is that the accomplice must also have the mental state required for the crime of which he is to be convicted on an accomplice theory."); *id.* § 13.2(b) ("Generally, it may be said that accomplice liability exists when the accomplice intentionally encourages or assists, in the sense that his purpose is to encourage or assist another in the commission of a crime as to which the accomplice has the requisite mental state."); *id.* (noting that "one may become an accomplice by giving encouragement or assistance with knowledge that it will promote or facilitate a crime" but observing that "liability has seldom been imposed on this basis"). Moreover, even if LaFave is read as the Government proposes, actual analysis of the state laws demonstrates that the natural and prob-

The Model Penal Code provisions regarding aiding and abetting liability are inconsistent with the doctrine of natural and probable consequences. *See supra* n.18. The Commentaries make explicit that the rule of accomplice liability, MPC § 2.06, does not include the natural and probable consequences doctrine, which it labels "incongruous and unjust." MPC Commentaries Pt. I, vol. 1, at 312 & n.42 ("[T]he liability of an accomplice ought not to be extended beyond the purposes that he shares.").

The states do not support inclusion of the natural and probable consequences doctrine within the generic definition either. Indeed, only a handful of states appear to apply a natural and probable consequences doctrine to aiding and abetting liability—and, even among these states, it appears the doctrine is applied in a more limited manner.[21]

There is no clear majority of states that applies the natural and probable consequences doctrine.[22] Ten jurisdic-

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able consequences doctrine of aiding and abetting liability is *not* the prevailing view.

[21] For example, the Rhode Island Supreme Court has clearly held that the aider and abettor must share the principal's intent. *State* v. *Diaz*, 654 A.2d 1195, 1202 (R.I. 1995). It also has allowed jury instructions for aiders and abettors that permit liability based on the natural and probable consequences of one's *acts*, as opposed to the natural and probable consequences of the target crime. *State* v. *Medeiros*, 599 A.2d 723, 726 (R.I. 1991). This rule is plainly not the rule applied by California, although it utilizes similar language; the rule that one intends the natural and probable consequences of one's own acts is more closely connected to the actor than is a rule looking at the natural and probable consequences of someone else's conduct (*i.e.*, the crime). *See also* Me. Rev. Stat. Ann. tit. 17-A, § 57; *State* v. *Berry*, 711 A.2d 142, 145-146 (Me. 1998).

[22] This discussion and the supporting citations concern general aiding and abetting liability; they do not, of course, pertain to separate doctrines such as felony murder or conspiracy. Nor do they concern circumstances in which the intent requirement is not in play such as transferred intent or recklessness- or negligence-based crimes. Furthermore, all of these citations are intended to reflect the current state of the law, not prior views based on, *inter alia*, predecessor state statutes or the common law.

tions (nine states and the District of Columbia) expressly reject the doctrine.[23] At least sixteen more states impose intent requirements by statute and/or controlling case law that are inconsistent with the doctrine and, in any event, do not apply the doctrine to general aiding and abetting liability.[24] For at least four states, the most that can be said of

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[23] *See* Alaska Stat. § 11.16.110; *Riley* v. *State*, 60 P.3d 204, 214, 219-221 (Alaska Ct. App. 2002); *Tarnef* v. *State*, 512 P.2d 923, 928 (Alaska 1973); *State* v. *Phillips*, 46 P.3d 1048, 1056-1058 (Ariz. 2002); *State* v. *Wall*, 126 P.3d 148, 151-152 (Ariz. 2006) (en banc); Colo. Rev. Stat. § 18-1-603; *People* v. *Bogdanov*, 941 P.2d 247, 250-252 & n.8 (en banc), *as amended by* 955 P.2d 997 (Colo. 1997) (en banc), *disapproved of on other grounds by Griego* v. *People*, 19 P.3d 1, 7-8 (Colo. 2001) (en banc); *Wilson-Bey* v. *United States*, 903 A.2d 818, 821-822 (D.C. 2006) (en banc); *Kitt* v. *United States*, 904 A.2d 348, 354-356 (D.C. 2006); *Commonwealth* v. *Richards*, 293 N.E.2d 854, 859-860 (Mass. 1973); *Commonwealth* v. *Daughtry*, 627 N.E.2d 928, 930-931 (Mass. 1994); Mont. Code Ann. § 45-2-302; *State ex rel. Keyes* v. *Montana Thirteenth Jud. Dist. Ct.*, 955 P.2d 639, 642-643 (Mont. 1998); *Sharma* v. *State*, 56 P.3d 868, 871-873 (Nev. 2002); *cf. Bolden* v. *State*, 124 P.3d 191, 200 (Nev. 2005); *State* v. *Carrasco*, 946 P.2d 1075, 1079-1080 (N.M. 1997); *State* v. *Bacon*, 658 A.2d 54, 60-63 (Vt. 1995); *State* v. *Pitts*, 800 A.2d 481, 483-485 (Vt. 2002). Maryland has also expressly rejected this doctrine; liability for unintended crimes extends only to those crimes necessary to the accomplishment of the target crime or the escape therefrom. *Sheppard* v. *State*, 538 A.2d 773, 775 & n.3 (Md. Ct. App. 1988), *disapproved of on other grounds by State* v. *Hawkins*, 604 A.2d 489, 496-497 (Md. 1992); *State* v. *Raines*, 606 A.2d 265, 272-273 (Md. Ct. App. 1992); *Owens* v. *State*, 867 A.2d 334, 342-343 (Md. Ct. Spec. App. 2005).

[24] *See, e.g.*, N.H. Rev. Stat. Ann. § 626:8; *State* v. *Anthony*, 861 A.2d 773, 774-776 (N.H. 2004); N.J. Stat. Ann. § 2C:2-6; *State* v. *Torres*, 874 A.2d 1084, 1092 (N.J. 2005); *State* v. *Weeks*, 526 A.2d 1077, 1080-1082 (N.J. 1987); N.D. Cent. Code § 12.1-03-01; *State* v. *Lind*, 322 N.W.2d 826, 841-842 (N.D. 1982); 18 Pa. Cons. Stat. Ann. § 306; *Commonwealth* v. *Flanagan*, 854 A.2d 489, 493-494 (Pa. 2004); Utah Code Ann. § 76-2-202; *State* v. *Alvarez*, 872 P.2d 450, 461 (Utah 1994); *State* v. *Crick*, 675 P.2d 527, 534 (Utah 1983); *In re Domingo*, 119 P.3d 816, 820 (Wash. 2005); *State* v. *Evans*, 114 P.3d 627, 636-637 (Wash. 2005); *Jahnke* v. *State*, 692 P.2d 911, 921-922 (Wyo. 1984); *Fales* v. *State*, 908 P.2d 404, 408 (Wyo. 1995). Some states, which squarely fall in the category of states that do not apply the doctrine, nonetheless have case law that uses similar phraseology but in plainly distinguishable circumstances or in dicta. *See, e.g.*, *State* v. *Floyd*, 756 A.2d 799, 810 (Conn. 2000); *State* v. *Diaz*, 679 A.2d 902, 914

the natural and probable consequences doctrine for aiding and abetting liability is that it is occasionally referenced, or even applied by lower courts, although it is contrary to statute and apparently controlling case law.[25]

In such circumstances, it cannot fairly be said that the generic definition of "theft offense" includes liability for aiders and abettors under California's natural and probable consequences doctrine. *Taylor*, 495 U.S. at 598; *see also Scheidler*, 537 U.S. at 410. Accordingly, California Vehicle Code § 10851 necessarily creates liability beyond the scope of the generic definition of "theft offense."

3. The Natural And Probable Consequences Doctrine Is Inconsistent With Basic Criminal Justice Principles

The natural and probable consequences doctrine has been the subject of ample and growing criticism. *See, e.g.*, 2

(Conn. 1996); Haw. Rev. Stat. §§ 702-222, 702-223; *State* v. *Soares*, 815 P.2d 428, 430 (Haw. 1991); Ky. Rev. Stat. Ann. § 502.020; *Tharp* v. *Commonwealth*, 40 S.W.3d 356, 364-366 (Ky. 2000); *Commonwealth* v. *Nourse*, 177 S.W.3d 691, 699-700 (Ky. 2005); *Welch* v. *State*, 566 So. 2d 680, 684-685 (Miss. 1990); *State* v. *Roberts*, 709 S.W.2d 857, 863 & n.6 (Mo. 1986); *State* v. *Ferguson*, 20 S.W.3d 485, 497 (Mo. 2000); *State* v. *Logan*, 645 S.W.2d 60, 64-65 (Mo. Ct. App. 1982); N.Y. Penal Law § 20.00; *People* v. *Kaplan*, 556 N.E.2d 415, 417-418 (N.Y. 1990); *People* v. *Bello*, 705 N.E.2d 1209, 1211 (N.Y. 1998); Or. Rev. Stat. § 161.155; *State* v. *Pine*, 82 P.3d 130, 135, 137 & n.6 (Or. 2003); *State* v. *Anlauf*, 995 P.2d 547, 548-549 & n.1 (Or. Ct. App. 2000); S.D. Codified Laws § 22-3-3; *State* v. *Tofani*, 719 N.W.2d 391, 400 (S.D. 2006). In Idaho, one unexplained, outdated reference to the doctrine is easily overcome by more recent precedent that is flatly inconsistent and the absence of cases applying the doctrine. *Compare State* v. *Scroggins*, 716 P.2d 1152, 1158 (Idaho 1985) *and State* v. *Nevarez*, 130 P.3d 1154, 1158-1159 (Idaho Ct. App. 2005) *with State* v. *Ehrmantrout*, 595 P.2d 1097 (Idaho 1979) (per curiam).

[25] Ga. Code Ann. § 16-2-20; *Jackson* v. *State*, 599 S.E.2d 129, 131-132 (Ga. 2004); *Jordan* v. *State*, 530 S.E.2d 192, 193-194 (Ga. 2000); *State* v. *Meyers*, 683 So. 2d 1378, 1382 (La. Ct. App. 1996); *State* v. *Holmes*, 388 So. 2d 722, 725-727 (La. 1980); Ohio Rev. Code Ann. § 2923.03; *State* v. *Johnson*, 754 N.E.2d 796, 799-801 (Ohio 2001); *State* v. *Herring*, 762 N.E.2d 940, 947-948 (Ohio 2002); Tex. Penal Code Ann. § 7.02; *Ex parte Thompson*, 179 S.W.3d 549, 552 (Tex. Crim. App. 2005).

LaFave § 13.3. While these critiques are not directly relevant to the *Taylor* analysis, the context helps explain why the states have increasingly rejected the doctrine.

As Professor LaFave has noted, the natural and probable consequences doctrine is "inconsistent with more fundamental principles of our system of criminal law." 2 LaFave § 13.3(b).[26] Significantly, as several other commentators have observed, "[i]t would permit liability to be predicated upon negligence even when the crime involved requires a different state of mind. Such is not possible as to one who has personally committed a crime, and should likewise not be the case as to those who have given aid or counsel." *Id.* (footnote omitted).

The Model Penal Code Commentaries similarly explain:

> To say that the accomplice is liable if the offense committed is "reasonably foreseeable" or the "probable consequence" of another crime is to make him liable for negligence, even though more is required in order to convict the principal actor. This is both incongruous and unjust; if anything the culpability level for the accomplice should be higher than that of the principal actor, because there is generally more ambiguity in the overt conduct engaged in by the accomplice, and thus a higher risk of convicting the innocent.

MPC Commentaries Pt. I, vol. 1, at 312 & n.42 (1985). Courts have expressed similar views. *See, e.g.*, *State* v. *Phillips*, 46 P.3d 1048, 1056-1057 (Ariz. 2002) (rejecting the "ab-

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[26] *See also, e.g.*, Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 Hastings L.J. 91, 98-99 n.36 (1985) (doctrine "[o]ne of the most troubling and frequently criticized aspects of accomplice liability"); Sanford H. Kadish, *Complicity, Cause, and Blame: A Study in the Interpretation of Doctrine*, 73 Cal. L. Rev. 323, 351-352 (1985) (criticizing doctrine's lack of intent requirement); Paul H. Robinson, *Imputed Criminal Liability*, 93 Yale L.J. 609, 638-639 (1984) (criticizing doctrine's weak causal requirements).

surd result" of the natural and probable consequences doctrine that "would allow a defendant who did *not* intend to aid in an offense to be an accomplice *in that offense*" (emphasis in original)).

The doctrine is also inconsistent with the goals of the modern project to abandon the common law distinctions between principals and aiders and abettors. These distinctions at common law gave rise to a host of procedural complications; there were restrictions on where aiders and abettors could be charged, stringent requirements for consistency between the charge against the individual and the proof at trial, and the conviction of the principal was a prerequisite to the trial of an accomplice. *See generally* 2 LaFave § 13.1(d). The modern approach abandons these distinctions and treats principals and aiders and abettors the same, holding all liable for the underlying offense and thus overcoming the procedural hurdles; now, *inter alia*, indictments need not specify whether the individual was an aider or abettor or principal, juries need not decide the question, the principal's conviction is not a prerequisite for the conviction of the aider and abettor, and rules of evidence previously applicable to principals only apply to all.[27]

The natural and probable consequences doctrine reintroduces distinctions. Under the doctrine, it is unnecessary to prove that an aider and abettor intended a given crime so long as it is the natural and probable consequence of a crime that was intended. A principal, of course, except in limited circumstances such as felony murder (*see infra* n.31), will need to possess the requisite intent for the crime. The practical consequence is that the jury will need to determine whether the defendant is an aider and abettor or principal and then apply the relevant intent requirement. *Cf.* Weiss, 70 Fordham L. Rev. at 1365.

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[27] *See generally* 2 LaFave § 13.1(e) (describing and collecting statutes removing procedural obstacles); *see also Standefer* v. *United States*, 447 U.S. 10 (1980); Weiss, 70 Fordham L. Rev. at 1362-1363.

In addition, the criminal law permits an individual to be liable for the unintended secondary acts of another only in rare circumstances. The *Pinkerton* rule of conspiracy liability,[28] for example, which has some superficial similarity to the natural and probable consequences doctrine, has justifications and limits that are not available for the natural and probable consequences doctrine.

First, a criminal conspiracy is an offense "of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime." *Pinkerton*, 328 U.S. at 644. It "involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices." *Id.*; *see also United States* v. *Jimenez Recio*, 537 U.S. 270, 274-275 (2003) (labeling conspiratorial agreement "a distinct evil" (citation omitted)).

Second, for a conspiracy charge, prosecutors are required to show the existence of an unlawful agreement. This element requires prosecutors to establish that the policy concerns just mentioned are in play.[29] Perhaps even more importantly, the unlawful agreement serves to satisfy the intent requirement for subsequent acts. *Pinkerton*, 328 U.S. at 647 (liability for the acts of co-conspirators permitted in part because the "[t]he criminal intent to do the act is established by the formation of the conspiracy").[30]

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[28] Under *Pinkerton* v. *United States*, 328 U.S. 640, 645 (1946), one co-conspirator is liable for the offenses of another co-conspirator so long as the offense was committed "in furtherance of [an] unlawful agreement or conspiracy."

[29] *Iannelli* v. *United States*, 420 U.S. 770, 777-778 & n.10 (1975) (noting that the "agreement remains the essential element of the crime, and serves to distinguish conspiracy from aiding and abetting which, although often based on agreement, does not require proof of that fact").

[30] *See also* 2 LaFave § 12.2(a) ("The agreement is all-important in conspiracy, for one must look to the nature of the agreement to decide several critical issues, such as whether the requisite mental state is also present . . . .").

No such justifications and limitations exist for the natural and probable consequences doctrine. Although extensive liability may be warranted in the conspiracy context because of the special evils it fosters, there is no basis to extend it to complicity absent conspiracy. Furthermore, because there is no agreement requirement in ordinary aiding and abetting liability, liability may be much more expansive. Also, the intent requirement is left unsatisfied. Thus, the natural and probable consequences doctrine is distinguishable from, and broader than, the limited *Pinkerton* rule.[31]

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Yet, at bottom, whether the natural and probable consequences doctrine is a good or bad doctrine is of no moment. As demonstrated above, it is rejected by the Model Penal Code and is not the prevailing view in the majority of states. As a result, in light of California's extremely broad aiding and abetting liability, California Vehicle Code § 10851 sweeps more broadly than a generic "theft offense" and, therefore, is not a categorical "theft offense" under the INA. *See Taylor*, 544 U.S. at 598-600.

III. CALIFORNIA VEHICLE CODE § 10851 INCLUDES LIABILITY WITHOUT THE REQUISITE INTENT OF A "THEFT OFFENSE"

California Vehicle Code § 10851 has a minimal mens rea requirement. Specifically, it permits conviction "*with or without intent to steal.*" Cal. Veh. Code § 10851(a) (emphasis added). It permits conviction of one who drives or takes a

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[31] The felony murder doctrine also shares superficial features with the natural and probable consequences doctrine. The felony murder rule derives from the common law rule that one who brings about an unintended death in the process of committing a felony is guilty of murder. *See, e.g.*, 2 LaFave § 14.5. As the name implies, it has a limited scope, whereas the natural and probable consequences doctrine applies broadly in California. Moreover, the felony murder doctrine is itself subject to increasing criticism. *See, e.g., id.* Several states have abolished it entirely. *See, e.g.*, Haw. Rev. Stat. § 707-701; Ky. Rev. Stat. Ann. § 507.020; *People* v. *Aaron*, 299 N.W.2d 304, 312-316 (Mich. 1980).

vehicle intending to deprive the owner of possession for any period of time, no matter how short—even if only a brief or momentary deprivation is intended. *See People* v. *Score*, 120 P.2d 62, 64 (Cal. Dist. Ct. App. 1941) ("When a person temporarily deprives the owner of a vehicle of temporary possession even without intent to steal, he is guilty of a felony.... Temporary possession may be for a day and it may be for less than a minute.").[32] In other words, § 10851 reaches conduct commonly known as "joyriding." *See, e.g.*, *People* v. *Allen*, 984 P.2d 486, 490 (Cal. 1999) ("Vehicle Code section 10851 can be violated either by taking a vehicle with the intent to steal it or by driving it with the intent only to temporarily deprive its owner of possession (*i.e.*, joyriding).").

The mens rea required under California Vehicle Code § 10851 stands in stark contrast to the California statutes that cover car theft. Section 487(d) of the California Penal Code specifies that the taking of an automobile (regardless of value) is "[g]rand theft," *see* 2 Witkin & Epstein, Crimes Against Property § 6, and, as the Supreme Court of California has noted, a conviction for grand theft auto "*necessarily* requires a finding that the accused intended to steal." *People* v. *Jaramillo*, 548 P.2d 706, 709 (Cal. 1976); *see also* Cal. Penal Code § 484(a) (general theft).

In light of its minimal mens rea element, there can be little doubt that California Vehicle Code § 10851 sweeps more broadly than the generic definition of theft. *Compare, e.g.*, 3 LaFave § 19.5 ("[f]or larceny there must be an intent to steal") *with* Cal. Veh. Code § 10851(a) (liability for driving or taking "with or without intent to steal"). Indeed, given the minimal mens rea required for joyriding, it is hard to

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[32] Thus, in crafting the new jury instructions in 2006, the Judicial Council of California set no lower temporal bound on the intent required for a conviction under § 10851, permitting conviction if the defendant "intended to deprive the owner of possession or ownership of the vehicle *for any period of time*." Judicial Council of Cal. Crim. Jury Instns. (2006) CALCRIM No. 1820 (emphasis added).

imagine that Congress intended to deem a joyrider an "aggravated felon," thereby leading to mandatory deportation and a permanent bar from the United States. *See* 8 U.S.C. §§ 1182(a)(9)(A)(i), 1227(a)(2), 1229b(a).

While this Court need not decide the precise contours of the mens rea required for a theft offense, the mens rea requirement must be more robust than that which is sufficient for a conviction under § 10851.[33]

A. Evolution Of Theft Crimes

Larceny was the original, common-law theft crime; indeed, "theft" was sometimes used as a synonym for the crime of larceny. *See* 4 Blackstone at 229 (describing crime of "[l]arciny, or theft"); *Black's Law Dictionary* 1477 (6th ed. 1990) (first entry for "theft": "A popular name for larceny.").[34] Larceny required a trespassory taking and carry-

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[33] This Court may affirm the judgment of the Court of Appeals on any ground properly raised below. *E.g., Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 38-39 (1989). Respondent presented both to the BIA (Pet. App. 18a-19a) and to the Ninth Circuit (Pet.-Appellant's Substitute Opening Br., No. 04-74471, at 7-9, 12) the argument that § 10851 is not a "theft offense" because the required mens rea is less than is required for "theft."

The Government, moreover, has put these questions directly at issue both by arguing that "the offense of which respondent was convicted satisfies the generic definition of 'theft offense'" (Gov't Br. 27 (capitalization altered)), and by asking that the court of appeals' judgment be reversed rather than vacated (*id.* at 33). If this Court finds the arguments in Section B of the Government's brief to be "fairly included" within the question presented, S. Ct. R. 14.1(a), then it must also consider Respondents' arguments herein. That is particularly so given that the intent to steal argument pertains to *Taylor*'s first step (the categorical approach), and is thus logically prior to the arguments in Section B of the Government's brief, which pertain to *Taylor*'s second step. *Cf. Caterpillar Inc.* v. *Lewis*, 519 U.S. 61, 75 n.13 (1996) (questions "'predicate to an intelligent resolution' of the question presented" are 'fairly included' within the question presented" (citation omitted)).

[34] *See also Black's Law Dictionary* 1516 (8th ed. 2004) (first entry for "theft": "The felonious taking and removing of another's personal property with the intent of depriving the true owner of it; larceny.").

ing away of the personal property of another with intent to steal. 3 LaFave § 19.2. The intent to steal—traditionally expressed as the requirement that the taking be "felonious; that is, done animo furandi," 4 Blackstone at 232 (emphasis omitted)—served to distinguish felons from "mere trespassers, and other petty offenders," *id.* The typical articulation required the wrongdoer to act with intent "to deprive the owner of his property permanently." 3 James Fitzjames Stephen, *A History of the Criminal Law of England* 132 (1883); *see also Van Vechten* v. *American Eagle Fire Ins. Co.*, 146 N.E. 432, 432 (N.Y. 1925) (Cardozo, J.) (in general, there is no larceny unless actor intended "to appropriate another's property permanently and wholly" (citing cases)).

A corollary of the requirement of intent to steal is the principle that, where an individual takes property intending only to use it briefly and to return it, there is no larceny. *See, e.g., Regina* v. *Trebilcock*, 7 Cox Crim. Cas. 408, 411 (1858) ("If at the time of the asportation his intention is to make a mere temporary use of the chattels taken, so that the *dominus* should again have the use of them afterwards, that is a trespass, but not a felony."). As Blackstone states, "if a neighbour takes another's plough, that is left in the field, and uses it upon his own land, and then returns it," then there can be no larceny because the requisite intent—the animus furandi—is lacking. 4 Blackstone at 232.

Larceny's requirement of a trespassory taking, however, proved in certain circumstances to be a hurdle to the conviction of culpable individuals. Where the individual appropriated property already lawfully in her possession (such as a bank clerk who pocketed cash just handed to her by a customer, instead of putting it in the cash draw), or who deceived a victim into willingly transferring title to his property by telling him lies, a trespass was difficult to find. In the late 18th century, Parliament filled these voids with the statutory offenses of embezzlement and false pretenses. *See Bell* v. *United States*, 462 U.S. 356, 359 (1983). The lacunae that prompted these changes, however, had to do only with

the wrongdoer's external acts, not the wrongdoer's intent with respect to the property appropriated.

B. The Minimum Mens Rea vFor A Theft Offense

Today, the term "theft" is generally thought to include larceny, embezzlement, and false pretenses.[35] Not surprisingly, the core mens rea principles of the common law have carried into the modern definition of "theft." *See generally Black's Law Dictionary* 1477 (6th ed. 1990) ("Theft is any of the following acts done with intent to deprive the owner permanently of the possession, use or benefit of his property: (a) Obtaining or exerting unauthorized control over property; or (b) Obtaining by deception control over property; or (c) Obtaining by threat control over property; or (d) Obtaining control over stolen property knowing the property to have been stolen by another.").[36] Simply stated, the brief taking of property with the intent to return it does not satisfy the mens rea requirement for a theft offense. *See generally* Brief for Amici Curiae Professors of Criminal Law.

Larceny. First, with respect to larceny offenses, Professor LaFave states: "For larceny there must be an intent to steal." 3 LaFave § 19.5; *compare with* Cal. Veh. Code § 10851

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[35] The leading treatise, for example, divides its "Theft" chapter into discussions of larceny, embezzlement, and false pretenses. 3 LaFave ch. 19; *see also id.* at § 19.8 (historically, "the wrongful appropriation of another's property was covered by three related but separate, non-overlapping crimes—larceny, embezzlement and false pretenses" (footnote omitted)); *Black's Law Dictionary* 1477 (6th ed. 1990) ("[T]heft is a wider term than larceny and . . . includes swindling and embezzlement."); *United States* v. *Turley*, 352 U.S. 407, 412 n.8, 415-417 (1957) (holding that "stolen" in National Motor Vehicle Theft Act is not limited to taking by larceny, but also includes embezzlement).

[36] The "most relevant time for determining a statutory term's meaning" is the year of enactment. *MCI Telecomms. Corp.* v. *AT&T Co.*, 512 U.S. 218, 228 (1994) (discussing dictionary definitions). The sixth edition of *Black's Law Dictionary* was current in 1994, when "theft offense" was added to § 1101(a)(43)(G). *See* Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222.

(covering individuals acting "without intent to steal"). It is quite clear that use of property for a reasonable time with an intent to return is not sufficient for a larceny offense. As Professor LaFave states, "[o]ne who takes another's property intending at the time he takes it to use it temporarily and then to return it unconditionally within a reasonable time—and having a substantial ability to do so—lacks the intent to steal required for larceny." *Id.* at § 19.5(b).

In the great majority of states—at least forty-two—an individual who takes property intending to use it briefly and return it is not guilty of larceny-type theft.[37] In only two

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[37] Nineteen states prohibit unauthorized taking with intent to "deprive"; sixteen of those states define "deprive" in such a way as to exclude from the statute's reach deprivations with intent merely to use for a brief time and return, and the remaining three employ a broader definition of "deprive" but narrow it through case law to yield the same result. For the substantive prohibitions, *see* Ala. Code § 13A-8-2; Ariz. Rev. Stat. Ann. § 13-1802(A)(1); Ark. Code Ann. § 5-36-103(a)(1); Haw. Rev. Stat. § 708-830(1); Ky. Rev. Stat. Ann. § 514.030; Me. Rev. Stat. Ann. tit. 17-A, § 353; Md. Code Ann., Crim. Law § 7-104(a); Mo. Rev. Stat. § 570.030; Neb. Rev. Stat. § 28-511; Nev. Rev. Stat. § 205.0832(1)(a); N.H. Rev. Stat. Ann. § 637:3; N.J. Stat. Ann. § 2C:20-3; N.D. Cent. Code § 12.1-23-02(1); 18 Pa. Cons. Stat. Ann. § 3921; Tenn. Code Ann. § 39-14-103; Tex. Penal Code Ann. § 31.03; Utah Code Ann. § 76-6-404; Wash. Rev. Code § 9A.56.020; Wyo. Stat. Ann. § 6-3-402(a). For definitions of "deprive," *see* Ariz. Rev. Stat. Ann. § 13-1801(A)(4); Ark. Code Ann. § 5-36-101(4); Haw. Rev. Stat. § 708-800; Ky. Rev. Stat. Ann. § 514.010(1); Me. Rev. Stat. Ann. tit. 17-A, § 352(3); Mo. Rev. Stat. § 570.010(8); Neb. Rev. Stat. § 28-509(1); Nev. Rev. Stat. § 205.0824; N.H. Rev. Stat. Ann. § 637:2(III); N.J. Stat. Ann. § 2C:20-1(a); N.D. Cent. Code § 12.1-23-10(3); 18 Pa. Cons. Stat. Ann. § 3901; Tenn. Code Ann. § 39-11-106(a)(8); Tex. Penal Code Ann. § 31.01(2); Utah Code Ann. § 76-6-401(3); Wyo. Stat. Ann. § 6-3-401(a)(ii). For the broader definitions of "deprive" and case law constraining the definition, *see* Ala. Code § 13A-8-1(2); Md. Code Ann., Crim. Law § 7-101; Wash. Rev. Code § 9A.56.010(6); *Strickland* v. *State*, 771 So. 2d 1123, 1124, 1126-1129 (Ala. Crim. App. 1999); *In re Lakeysha P.*, 665 A.2d 264, 276 (Md. Ct. Spec. App. 1995); *State* v. *Walker*, 879 P.2d 957, 959-960 (Wash. Ct. App. 1994).

Eighteen states require through their statutes or by case law an intent to (or a knowing use that will) deprive "permanently." Colo Rev. Stat. § 18-4-401; 720 Ill. Comp. Stat. 5/16-1, 5/15-3 (defining "permanently deprive" in a way materially similar to the Model Penal Code's definition

states and the District of Columbia would such intent clearly be sufficient for theft.[38] (The situation is ambiguous in the remaining six states.[39])

The Model Penal Code similarly provides that an individual who took property intending to use it briefly and return it is not guilty of larceny-type theft.[40] The model code compels this result by requiring that the wrongdoer act with

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of "deprive"); Kan. Stat. Ann. §§ 21-3701, 21-3110(6) (same); La. Rev. Stat. Ann. § 14:67(A); Wis. Stat. § 943.20(1)(a); *People* v. *Davis*, 965 P.2d 1165, 1167-1168 (Cal. 1998); *State* v. *Schminkey*, 597 N.W.2d 785, 788-789 (Iowa 1999); *Commonwealth* v. *Cheromcka*, 850 N.E.2d 1088, 1100 (Mass. App. Ct. 2006); *People* v. *Goodchild*, 242 N.W.2d 465, 468 (Mich. Ct. App. 1976); *Crouse* v. *State*, 89 So. 2d 919, 922-923 (Miss. 1956); *State* v. *Rhea*, 523 P.2d 26, 28 (N.M. Ct. App. 1974); *State* v. *Barbour*, 570 S.E.2d 126, 127 (N.C. Ct. App. 2002); *Tate* v. *State*, 706 P.2d 169, 171 (Okla. Crim. App. 1985); *In re Timothy*, 442 A.2d 887, 890 (R.I. 1982); *Kerrigan* v. *State*, 406 S.E.2d 160, 161 (S.C. 1991); *State* v. *Hanson*, 446 A.2d 372, 374-375 (Vt. 1982); *Bright* v. *Commonwealth*, 356 S.E.2d 443, 444 (Va. Ct. App. 1987); *State* v. *Casto*, 480 S.E.2d 525 527-28 (W. Va. 1996).

Four states require an intent to "deprive" or to "appropriate," and the definitions of both terms, as construed in case law, exclude deprivations with intent to use briefly and return. For the substantive prohibition, *see* Alaska Stat. § 11.46.100(1); Del. Code Ann. tit. 11, § 841(a); N.Y. Penal Law § 155.05; Or. Rev. Stat. § 164.015(1). For the definitions of "deprive" and "appropriate," *see* Alaska Stat. § 11.46.990(2), (8); Del. Code Ann. tit. 11, § 857(1), (2); N.Y. Penal Law § 155.00(3), (4); Or. Rev. Stat. § 164.005(1), (2). For cases interpreting these provisions, *see Champion* v. *State*, 908 P.2d 454, 464-467 (Alaska Ct. App. 1995); *State* v. *Willis*, 673 A.2d 1233, 1240 & n.9 (Del. Super. Ct. 1995); *People* v. *Jennings*, 504 N.E.2d 1079, 1086-1087 (N.Y. 1986); *State* v. *Christine*, 93 P.3d 82, 87 (Or. Ct. App. 2004). Finally, one state requires intent either to deprive permanently or to effect a temporary deprivation with qualifications that exclude intent to use for a brief time and return. Minn. Stat. § 609.52 subdiv. 2(1), 2(5).

[38] Fla. Stat. § 812.014; Ga. Code Ann. § 16-8-2; D.C. Code § 22-3211.

[39] Conn. Gen. Stat. § 53a-119; Idaho Code § 18-2403; Ind. Code § 35-43-4-2; Mont. Code Ann. § 45-6-301; Ohio Rev. Code Ann. § 2913.02; S.D. Codified Laws § 22-30A-1.

[40] In the "modern statutes dealing with theft[,] [b]y far the most common approach is to follow the Model Penal Code ...." 3 LaFave § 19.5.

"purpose to deprive" the owner of the property taken, MPC § 223.2(1), and defining "deprive" to mean:

> (a) to withhold property of another permanently or for so extended a period as to appropriate a major portion of its economic value, or with intent to restore only upon payment of reward or other compensation; or (b) to dispose of the property so as to make it unlikely that the owner will recover it.

MPC § 223.0(1). Under this definition, an individual who takes property intending to use it for a few moments (or even a few hours) and then return it will not "deprive" the owner of the property.

Embezzlement. With respect to embezzlement, Professor LaFave similarly explains that a person who takes with an intent to return is not guilty of embezzlement: "One who, with another's property in his rightful possession, converts it, intending, however, to return the specific property (and having a substantial ability to return it) in its original condition, after a period of time, is not guilty of embezzlement, for he lacks the fraudulent intent which embezzlement requires." 3 LaFave § 19.6(f)(2) (footnote omitted). And, in fact, the embezzlement prohibitions of the majority of states likewise require an intent more robust than the intent to use property temporarily and return it.[41] Only five states and

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[41] This is true in at least 29 states. Nineteen states require intent to "deprive," or to "deprive" or "appropriate," and use the same definition of those terms as applied in larceny cases. Ala. Code § 13A-8-2(1); Alaska Stat. § 11.46.100(1); Ark. Code Ann. § 5-36-103(a)(1); Del. Code Ann. tit. 11, § 841(a); Haw. Rev. Stat. § 708-830(1); Ky. Rev. Stat. Ann. § 514.030; Me. Rev. Stat. Ann. tit. 17-A, § 353; Mo. Rev. Stat. § 570.030; Neb. Rev. Stat. § 28-511; N.H. Rev. Stat. Ann. § 637:3; N.J. Stat. Ann. § 2C:20-3; N.Y. Penal Law § 155.05; N.D. Cent. Code § 12.1-23-02(1); Or. Rev. Stat. § 164.015(1); 18 Pa. Cons. Stat. Ann. § 3921; Tenn. Code Ann. § 39-14-103; Tex. Penal Code Ann. § 31.03; Utah Code Ann. § 76-6-404; Wyo. Stat. Ann. § 6-3-402(b). For the definitions of "deprive" and "appropriate," *see supra* n.37.

In a further ten states, either statutes or case law makes clear that an intent to use briefly and return will not be sufficient for embezzlement. An intent to deprive "permanently" is required by statute in four states,

the District of Columbia unequivocally reject this position.[42] In addition, the embezzlement provision of the Model Penal

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Colo. Rev. Stat. § 18-4-401; 720 Ill. Comp. Stat. 5/16-1; Kan. Stat. Ann. § 21-3701; La. Rev. Stat. Ann. § 14:67(A); *see also supra* n.37 (citing definitions of deprive "permanently" in Illinois and Kansas), and by case law in two states, *Commonwealth* v. *Oliver*, 805 N.E.2d 1019, 1021 (Mass. Ct. App. 2004); *State* v. *Oliveira*, 432 A.2d 664, 666 (R.I. 1981). Cases in three states make clear that the only difference between larceny and embezzlement is the timing of the intent relative to gaining possession, *Ennis* v. *State*, 167 P. 229, 233 (Okla. Crim. App. 1917); *State* v. *Butler*, 1884 WL 4584 (S.C. July 1, 1884); *State* v. *Moyer*, 52 S.E. 30, 32 (W. Va. 1905), and thus that an intent approximating larceny's intent permanently to deprive is required for embezzlement, *Butler*, 1884 WL 4584, at *2 ("with the intent to make it his own, and to destroy the title of the true owner"), or conversely that intent to deprive temporarily and return is insufficient, *see Chapman* v. *State*, 212 P.2d 485, 488 (Okla. Crim. App. 1949); *Moyer*, 52 S.E. at 32. Finally, one state defines the theft offense in such a way as to exclude conversion with intent to use briefly and return. Minn. Stat. § 609.52 subdiv. 2(1), 2(5).

[42] D.C. Code § 22-3211; Fla. Stat. § 812.014; Ga. Code Ann. § 16-8-2; Iowa Code § 714.1(2); N.M. Stat. § 30-16-8; S.D. Codified Laws §§ 22-30A-1, 22-30A-10. The rule is ambiguous in the remaining sixteen states. Ariz. Rev. Stat. Ann. § 13-1802; Cal. Penal Code §§ 484(a), 503-515; Conn. Gen. Stat. § 53a-119; Idaho Code § 18-2403; Ind. Code § 35-43-4-2; Md. Code Ann., Crim. Law §§ 7-104(a), 7-113; Mich. Comp. Laws §§ 750.174, 750.362; Miss. Code Ann. §§ 97-11-25, 97-23-19; Mont. Code Ann. § 45-6-301(1), (7); Nev. Rev. Stat. § 205.0832(1)(b); N.C. Gen. Stat. §§ 14-90 to 14-99; Ohio Rev. Code Ann. § 2913.02; Vt. Stat. Ann. tit. 13, §§ 2531-2538; Va. Code Ann. § 18.2-111; Wash. Rev. Code § 9A.56.020; Wis. Stat. § 943.20(1)(a), (b).

Determining whether a state rejects the majority position is made difficult by the fact that there exist two generally accepted principles that are entirely distinct analytically but rather similar in articulation to such a rejection. First, it is "uniformly held" that intent to return *equivalent* property is no defense to embezzlement. 3 LaFave § 19.6(f)(3). For the defense to be available, the intent must be to restore the very property taken. *Id.* § 19.6(f)(2). Second, there is a similarly well-established rule that if the initial act of taking or conversion is done with the necessary intent, then a later-formed intent to return the property is no defense. *See, e.g.*, 3 Charles E. Torcia, *Wharton's Criminal Law* § 385 (15th ed. 1995) ("To constitute embezzlement, the property must be appropriated or converted with the intent permanently to deprive.... Given a fraudulent appropriation or conversion, an embezzlement is committed even if the defendant intends at some subsequent time to return the property or to

Code requires intent to "deprive," and uses the same definition of "deprive" as applied to larceny.[43]

False Pretenses. False pretenses differs from larceny and embezzlement in that title to the property must pass from the victim to the wrongdoer for the crime to be complete. *Bell*, 462 U.S. at 359-360 ("The theoretical distinction between false pretenses and larceny by trick may be stated simply. If a thief, through his trickery, acquired *title* to the property from the owner, he has obtained property by false pretenses; but if he merely acquired *possession* from the owner, he has committed larceny by trick.").[44] Rarely, if ever, will an individual trick an owner into parting with title to property when the individual's only intent is to use the property for a brief time and return it. If, as is far more likely, an individual tricks the owner into parting only with possession, the crime is not false pretenses, but larceny,[45] *see Bell*, 462 U.S. at 359-360, and the intent requirement for lar-

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make restitution to the owner."). Statements in case law frequently are equivocal between stating one of these two principles and rejecting the majority position. Furthermore, in some states the statute is unclear and the only relevant declaration found regarding intent in the case law is that an intent permanently to deprive is not required for embezzlement, thus not settling conclusively the question whether an intent to deprive for a brief time and return would be sufficient.

[43] The model code in fact criminalizes larceny and embezzlement in a single section, providing that a person is guilty of theft "if he unlawfully takes, or exercises unlawful control over, movable property of another with purpose to deprive him thereof." MPC § 223.2(1). Several states take the same approach. *E.g.*, Ky. Rev. Stat. Ann. § 514.030; N.J. Stat. Ann. § 2C:20-3.

[44] *See also* MPC §§ 223.3, 223.0(5)(a) ("Theft by Deception") (a person is guilty of theft by deception if he "bring[s] about a transfer . . . of a legal interest in the property" through deception); *see also* MPC Commentaries Pt. II, vol. 2, at 182-183 (1980) (theft by deception "is not an offense designed to safeguard possession").

[45] Although "[t]he expression 'larceny by trick' is often used to identify this type of larceny, . . . it is the crime of larceny and not a separate crime." 3 LaFave § 19.1(a)(3) & n.7 (describing leading larceny by trick case of *Rex* v. *Pear*, 168 Eng. Rep. 208 (1779)).

ceny[46] will apply. False pretenses therefore has little relevance to takings with intent to use briefly and return. *See* MPC Commentaries Pt. II, vol. 2, at 182 (1980) ("Theft by deception . . . is not an offense designed to safeguard possession, nor does it protect against the use of deception to gain temporary possession or control of property or to continue a possession or control that was lawfully acquired.").[47]

Yet even with respect to false pretenses, there is no liability if one takes with an intent to return. As Professor LaFave states:

> To be guilty of false pretenses (under the typical statute) it is not enough that the wrongdoer tells what he knows or believes to be false . . .; in addition, he must have an intent to defraud. . . . As with the analogous theft crimes, larceny and embezzlement, one who tells intentional lies nevertheless is not guilty of false pretenses, because he lacks the intent to defraud, if . . . he intends to restore the very property taken, unconditionally and within a reasonable time, and has a substantial ability to do so. . . .

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[46] *See supra* nn.37-40 and accompanying text.

[47] Moreover, serious doubt exists as to whether a conviction under California Vehicle Code § 10851 could ever amount to false pretenses, because the statute requires that the taking be "without the consent of the owner," and in false pretenses the owner's consent is always obtained, albeit fraudulently. *People* v. *Cook*, 39 Cal. Rptr. 802, 804-805 (Cal. Dist. Ct. App. 1964) ("[F]raud in the inducement . . . does not vitiate consent. . . . [S]ection 10851 of the Vehicle Code makes no reference to fraud, false pretense or trick and device but is specifically based upon the taking without consent. . . . Consent having been given, there was no violation of section 10851 . . . ." (emphasis omitted)); CALCRIM No. 1820 (in "Related Issues" section under jury instruction applicable to § 10851, stating "*Consent Not Vitiated By Fraud.* The fact that an owner's consent was obtained by fraud or misrepresentation does not supply the element of nonconsent." (citing *Cook*)). *But cf. People* v. *Burford*, No. B156883, 2003 WL 1984547, at *3-4 (Cal. Ct. App. Apr. 30, 2003) (unpublished).

3 LaFave § 19.7(f)(2).[48]

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As a generic matter, then, it is clear that an individual who exerts unauthorized control over property but intends only to use it briefly and then return it lacks the intent required for theft.[49] Because § 10851 creates liability in such a

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[48] In addition, the language of § 1101(a)(43)(G) makes clear that Congress intended the phrase to reach another, historically separate theft crime: receipt of stolen property. Again, however, that intent defeats the intent required for the offense. As Professor LaFave states, "one who receives what he knows to be stolen property with the intent to restore it unconditionally to its owner does not have the requisite intent for the crime." 3 LaFave § 20.2(e); *see also* MPC § 223.6 (carving out from reach of receiving stolen property provision the circumstance where "the [stolen] property is received . . . with purpose to restore it to the owner"); MPC Commentaries Pt. II, vol. 2, at 237 (1980) (stating that "a purpose to restore defeats conviction" of receipt of stolen property).

[49] The Model Penal Code provides further indication that "joyriding" is not a theft crime. The drafters created a misdemeanor offense to cover joyriding—in MPC § 223.9—called "Unauthorized Use of Automobiles and Other Vehicles." The Commentary makes clear that the drafters saw this offense as distinct from those offenses properly labeled as theft crimes. In the "Introductory Note" to Article 223, the drafters explain that the "consolidation of traditional acquisitive offenses into the single offense called 'theft'" is accomplished by the consolidating section "and by the separate definition of different forms of the offense *in Sections 223.2 through 223.8.* . . . The offenses heretofore known as larceny, embezzlement, false pretense, extortion, blackmail, fraudulent conversion, receiving stolen property, and the like, . . . are thereby replaced with a unitary offense." MPC Commentaries Pt. II, vol. 2, at 122 (1980) (emphasis added). The joyriding offense in MPC § 223.9, by contrast, is discussed separately in the Note, and is described as "relat[ing] to the lesser included conduct of unauthorized use of property." MPC Commentaries Pt. II, vol. 2, at 123 (1980).

Indeed, the BIA itself has suggested that joyriding is not a theft offense. In *Matter of V-Z-S-*, the BIA considered whether California Vehicle Code § 10851 was a "theft" offense. The Board interpreted the statutory scheme before it was clear that joyriding was covered by § 10851. The Board stressed—on two separate occasions—that, in its view, § 10851 did not cover joyriding. 22 I. & N. Dec. 1338, 1348 (BIA 2000) ("a person . . . guilty of joyriding, or temporarily operating another's vehicle, without an intent to deprive the owner of such vehicle, . . . could not be [convicted] under section 10851(a)"); *id.* at 1349 ("The respondent's 1995 conviction

circumstance, this Court should hold that § 10851 is not categorically a "theft offense."[50]

IV. THE MODIFIED CATEGORICAL APPROACH IS NOT PROPERLY BEFORE THE COURT AND, REGARDLESS, SUPPORTS RESPONDENT

The Government argues that even if Respondent is correct that California Vehicle Code § 10851 includes liability for accessories after the fact—and thus exceeds the generic definition of "theft offense"—the judgment below should be

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was not under section 499b . . . which at the time was the California 'joyriding' statute."). The BIA also stressed that "'a glorified borrowing' of property is not a theft offense." *Id.* at 1346.

And regardless of whether the Board's interpretation of California law in *V-Z-S-* was correct, it is now clear that joyriding is punishable—and only punishable—under § 10851. Previously, California Penal Code § 499b had covered such conduct, but a 1997 amendment to that statute removed "automobile" from the statute's reach. The declared legislative intent in making this change was "'to clarify and streamline existing law by deleting provisions in Section 499b of the Penal Code that are generally duplicative of provisions in subdivision (a) of Section 10851 of the Vehicle Code.'" *People* v. *Moon*, 117 P.3d 591, 607 n.3 (Cal. 2005), *cert. denied*, 126 S. Ct. 1146 (2006) (quoting Stats. 1996, ch. 660, § 3, Assembly Bill No. 3170 (additional citation omitted)).

[50] The Government generally accepts the Ninth Circuit's generic definition of theft. Gov't Br. 11 n.2 (quoting *Penuliar*, 435 F.3d at 969 ("[A] taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." (citations omitted))). If this definition would apply to an individual who acts with intent to use property briefly and then return it, then this definition is inconsistent with the mens rea requirement in a majority of States and the Model Penal Code. *See supra*. If, however, the definition covers intent to effect certain non-permanent deprivations—*i.e.*, those that appropriate a major portion of the economic value of the property taken—but excludes brief or momentary deprivations with an intent to return, then it would be consistent with general mens rea principles. *See* MPC § 223.0(1) ("deprive" defined as, inter alia, "to withhold property of another permanently or for so extended a period to appropriate a major portion of its economic value."); *cf.* 3 LaFave § 19.5 ("for larceny, one must intend to deprive the owner of the possession of his property either permanently or for an unreasonable length of time.").

reversed under the "modified categorical" approach; in the Government's view, "the charging instrument and corresponding judgment show that [Respondent] was not convicted as an accessory after the fact." Gov't Br. 30. The Court should decline the Government's invitation to engage in this fact-intensive inquiry and, instead, should remand for further proceedings before the agency. If, however, the Court decides to resolve this factual question, it should nonetheless hold for Respondent.

A. The Court Should Remand So The BIA May Consider The Fact-Intensive Modified Categorical Analysis In The First Instance

It is a "simple but fundamental rule of administrative law" that a reviewing court "must judge the propriety of [agency] action solely by the grounds invoked by the agency." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947). In this case, the BIA's brief order adopting the decision of the IJ indicated that it was based on the categorical inquiry alone. Pet. App. 3a (citing *Matter of V-Z-S-*, 22 I. & N. Dec. 1338 (BIA 2000) (determining that California Vehicle Code § 10851 was a categorical "theft offense")).[51] The Court should therefore remand to the agency for consideration under the modified approach. *Cf. Gonzales* v. *Thomas*, 126 S. Ct. 1613, 1614-1615 (2006) (per curiam).

The Government's approach to the case up to this point has been consistent with this principle. In its brief in the Ninth Circuit, the Government acknowledged that the categorical inquiry was controlled by the Ninth Circuit's prior

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[51] Even if the scope of the BIA decision were ambiguous, however, remand would be warranted. "It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive." *Chenery*, 332 U.S. at 196-197. The basis on which the agency decided "must be set forth with such clarity as to be understandable," because the Court "must know what a decision means before the duty becomes [the Court's] to say whether it is right or wrong." *Id.* (citation omitted).

decision in *Penuliar*. Resp. Br. 5 (*Penuliar* v. *Ashcroft*). And it asked the Ninth Circuit—on four separate occasions in its six-page brief—to remand Respondent's case to the BIA for further proceedings under the modified categorical approach. *Id.* at 4, 5, 6.

In seeking certiorari, the Government took a similar tack, presenting a question that concerned only the categorical inquiry. Now it asks the Court to engage in a highly fact-bound inquiry with little or no significance outside this case.

Even in *Shepard* v. *United States*, 544 U.S. 13 (2005), in which the question presented at least pertained to the modified categorical inquiry, the Court did not conduct such an inquiry; after determining which documents could be considered in the analysis to determine whether the defendant had been convicted of "burglary," the Court remanded for application of its rule to the case at hand. *Id.* at 26.

B. Even If This Court Reaches The Modified Categorical Analysis, It Should Hold For Respondent

As this Court has made clear, the modified categorical approach is a narrow inquiry.[52] Thus, a court may "go beyond the mere of fact of conviction"—*i.e.*, rule on the modified approach—"in a narrow range of cases" in which certain documents establish that the defendant was "necessarily" convicted of a generic offense. *Taylor*, 495 U.S. at 602; *see also Shepard*, 544 U.S. at 17.[53] This case does not fall within this narrow range.

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[52] *Cf. Taylor*, 495 U.S. at 601 ("[T]he practical difficulties and potential unfairness of a factual approach are daunting.").

[53] To the extent that *Shepard* and *Taylor* were based in part on the fact that those cases involved a sentencing enhancement, those considerations are equally present here. A prior conviction for an "aggravated felony" serves as a sentencing enhancement, increasing the maximum sentence for illegal reentry from 2 to 20 years, *see* 8 U.S.C. § 1326. In fact, this is the provision that was at issue in *Almendarez-Torres* v. *United States*, 523 U.S. 224, 228-229 (1998).

The Government argues that the documents in the record (specifically, the charging document)[54] purportedly establish that Respondent was not convicted as an accessory to the fact to the driving or taking of a vehicle under California Vehicle Code § 10851. The Government's sole argument on this score is that the charging document did not specifically charge Respondent as an accessory after the fact. Gov't Br. 30-32.

The Government's reasoning errs in two respects. First, it is simply not true that, in order to charge one as an accessory under California Vehicle Code § 10851, the charging document would need to so specify. The starting point for this modified categorical analysis, after all, is that § 10851 is a rare statute in that *it makes an accessory after the fact liable as a principal for the underlying offense.* This special feature of the statute means that the charging document in the present case is entirely consistent with a charge for an accessory after the fact. Second, even assuming arguendo that the information charged Respondent as a principal (*i.e.*, as driving or taking a vehicle), that does not demonstrate that he was convicted as such. California law makes clear that a California charging document does not control the basis for the ultimate conviction. Thus, even if Respondent were charged as a principal, he could have been convicted for the conduct of an accessory after the fact. Accordingly, the Government has failed to establish that Respondent was not convicted as an accessory after the fact.

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[54] The charging document is at Pet. App. 13a-15a. The only other document the Government references is the Abstract of Judgment. *Id.* at 11a-12a. The Government does not rely on this document, and with good reason: under California law, an "abstract of judgment" is not the actual judgment. *People* v. *Mitchell*, 26 P.3d 1040, 1042 (Cal. 2001) ("An abstract of judgment is not the judgment of conviction"; it is "merely a form prepared and signed by the clerk of the court" (internal quotations omitted)); *People* v. *Mesa*, 535 P.2d 337, 340 (Cal. 1975) (abstract of judgment not "controlling").

1. The Charging Documents Are Consistent With A Charge Under California Vehicle Code § 10851 As An Accessory After The Fact

The Government is incorrect that, under California law, a charging document would need to reference accessory liability in order to charge an individual as an accessory after the fact under California Vehicle Code § 10851.

As a general matter, California does not require prosecutors to allege criminal wrongdoing with any great specificity. *See, e.g.*, *People* v. *Britton*, 56 P.2d 494, 496 (Cal. 1936). It is sufficient for the charging document simply to mimic the language of the statute. Section 952 of the California Penal Code expressly provides that the charge "may be in the words of the enactment describing the offense or declaring the matter to be a public offense." *See also* 4 Witkin & Epstein, Pretrial Proceedings § 179 (noting that this "appears to be the most common . . . method of pleading").

In particular, no special allegations are required when other parties to a crime (such as aiders or abettors) are held liable under the substantive statute. As the Government acknowledges (Br. 31-32), because California law has abrogated the distinction between aiders and abettors and principals, *see* Cal. Penal Code § 971, the charging documents need not identify whether the individual is being charged as an aider and abettor or principal. In fact, the California Penal Code expressly provides that "no other facts need be alleged in any accusatory pleading against any [aider and abettor] than are required in an accusatory pleading against a principal." *Id.*; *see also People* v. *Kennedy*, 253 P.2d 522, 523-524 (Cal. Ct. App. 1953); *cf. People* v. *Steelik*, 187 Cal. 361, 368 (Cal. 1921) (charging one as principal and aider and abettor "would be duplicative" since both are liable for the offense).

The Government argues that, in contrast, accessories after the fact must be identified accordingly in the charging documents. Gov't Br. 31. In the ordinary case, the Government is correct; the law generally distinguishes principals

and aiders and abettors on the one hand, from accessories after the fact on the other.[55]

But the Government ignores the special feature of California Vehicle Code § 10851 that triggered this analysis in the first place: Section 10851 expressly reaches accessories after the fact, thereby eviscerating the distinction between accessories after the fact and principals. This express statutory provision—making the accessory liable for the substantive crime—alters the general rule with respect to charging accessories. Indeed, this exception to the general rule is noted in one of the very cases cited by the Government: the Government quotes *People* v. *Prado*, 136 Cal. Rptr. 521, 523 (Cal. Ct. App. 1977), for the proposition that "a person charged in an indictment as a principal cannot be convicted on evidence showing him to be only an accessory after the fact" (Br. 31 n.18), but omits the language immediately preceding this quotation (and in the same sentence), which makes clear that the general rule only holds "*in the absence of statute.*" *Prado*, 136 Cal. Rptr. at 523 (emphasis added).[56]

Put another way, aiders and abettors and accessories after the fact are on equal footing with respect to liability under § 10851—both are liable for the substantive crime on the same terms as the principal. Notably, neither need actually "take" or "drive" the vehicle and yet both are deemed liable under this statute. Their comparable status has logical im-

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[55] Indeed, the accessory after the fact is not only identified as such in a charging document, he is charged with a "separate and independent offense." *Montoya*, 874 P.2d at 909 (citation omitted); *see also* Cal. Penal Code § 32.

[56] The two other sources the Government cites for the proposition that the accessory after the fact must be charged differently from the principal are irrelevant. Gov't Br. 31 n.18 (citing *People* v. *Baker*, 330 P.2d 240 (Cal. Ct. App. 1958); 17 Cal. Jur. 3d Criminal Law: Core Aspects § 124, at 192 (2002)). Neither of these sources concerns statutes that include liability for an accessory after the fact. Thus, they merely stand for the ordinary rule that an accessory after the fact is guilty of a distinct crime from the underlying offense and must, therefore, be charged as such.

plications for the charging document. In this case, for example, the charging document merely repeated the statutory language, charging Respondent with "driv[ing] or tak[ing]" the vehicle. Pet. App. 13a.[57] Because this language in a charging document suffices to charge aiders and abettors—and the Government concedes it does—then, for the same reasons, such a charge is sufficient for accessories after the fact under this particular statute, which holds them liable for the underlying crime as well.

Nor do notice requirements demand a different result. Ordinarily, as the Government suggests, accessories after the fact—who are charged with a separate crime from the underlying felony—must be charged as such in order to provide notice of the charges. But, again, because accessories after the fact under California Vehicle Code § 10851 are directly liable under this statute as principals, recitation of the statutory language places a defendant on notice of the charges against him.[58]

In light of California's pleading requirements and the particular statute here at issue, it is clear that the charging document did not limit the theories of liability under California Vehicle Code § 10851 to the exclusion of accessory after the fact liability.

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[57] Indeed, contrary to the Government's suggestion (Gov't Br. 31), the charging document did not identify Respondent as a principal; it was silent as to his status.

[58] Moreover, the Government mistakenly assumes that the charging document is the only opportunity for notice. In California, however, "[u]nder modern pleading procedures, notice of the particular circumstances of an alleged crime is provided by the evidence presented to the committing magistrate at the preliminary examination, not by a factually detailed information." *People* v. *Jennings*, 807 P.2d 1009, 1023 (Cal. 1991) (citing *People* v. *Thomas*, 43 Cal. 3d 818, 829 (Cal. 1987)). *See also People* v. *Diaz*, 834 P.2d 1171, 1202-1203 (Cal. 1992) (en banc) ("[A]n accusatory pleading charging a defendant with murder need not specify the theory of murder on which the prosecution intends to rely" because "generally the accused will receive adequate notice of the prosecution's theory of the case from the testimony presented at the preliminary hearing.").

2. Even If The Charging Documents Are Read To Specify A Charge As Principal, California Law Demonstrates That Respondent Was Not Necessarily Convicted On That Theory

In addition, under California law, a guilty plea is not necessarily tied to the specifics of the formal charging document. California courts have long permitted informal, oral amendment of accusatory pleadings. As *People* v. *Sandoval*, 43 Cal. Rptr. 3d 911 (Cal. Ct. App. 2006), explains: "California law does not attach any talismanic significance to the existence of a written information," and thus allows, under the "informal amendment doctrine," for "a defendant's conduct [to] effect an informal amendment of an information without the People having formally filed a written amendment to the information." *Id.* at 926 (citing *People* v. *Rasher*, 83 Cal. Rptr. 724, 725, 727-728 (Cal. Ct. App. 1970); *People* v. *Hensel*, 43 Cal. Rptr. 865, 868 (Cal. Ct. App. 1965)).[59] Therefore, even if the written information is reflective of the prosecutor's theory at the time of charging, it may not be reflective of the actual information in place at the time of the plea.

Furthermore, the California Supreme Court has expressly recognized that a defendant may plead guilty to a crime that is different from that described in the written information without amending the information. In *People* v. *West*, 477 P.2d 409 (Cal. 1970), the Supreme Court of California stated that a "court, in accepting a knowing and voluntary plea of guilty or nolo contendere, is not limited in its jurisdiction to the offenses charged or necessarily included in those charged." *Id.* at 420 (citations omitted).[60] The

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[59] *See also* 4 Witkin & Epstein, Pretrial Proceedings § 213 ("The proceedings in the trial court may constitute an informal amendment of the accusatory pleading, when the defendant's conduct or circumstances created by him amount to an implied consent to the amendment.").

[60] The California Supreme Court explained, 477 P.2d at 420 (citations omitted):

> A defendant who knowingly and voluntarily pleads guilty or nolo contendere can hardly claim that he is unaware that he

"court may accept a bargained plea of guilty or nolo contendere to any lesser offense reasonably related to the offense charged in the accusatory pleading." *Id.* at 419. A "reasonable relationship between the charged offense and the plea obtains when (1) the defendant pleads to the same type of offense as that charged (. . . a 'categoric similarity'), or (2) when he pleads to an offense which he may have committed during the course of conduct which led to the charge." *Id.* at 420.[61]

A guilty plea as an accessory after the fact under California Vehicle Code § 10851 is plainly "reasonably related" to being a principal or aider and abettor under that same statute; there is a "categoric similarity" and the offense "may have been committed during the course of conduct that led to the original charge." Thus, one charged as a principal may, in fact, have pleaded guilty as an accessory after the fact.

In short—even reading the information as the Government suggests—the charging document in the present case does not establish that Respondent was "necessarily" convicted of a "theft offense"; under California law, based on these record documents there is no way to determine

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> might be convicted of the offense to which he pleads; his plea demonstrates that he not only knows of the violation but is also prepared to admit each of its elements. Although we could speak of defendant's plea as an 'implied' amendment of the information to add the charge to which defendant pleads, we see no need to fashion such a fiction . . . .

[61] *See also People* v. *Toro*, 766 P.2d 577, 580-581 (Cal. 1989) (en banc), *overruled on other grounds by People* v. *Guiuan*, 957 P.2d 928 (Cal. 1998) (establishing an exception to the rule that the defendant may not be convicted of uncharged offenses "in cases where a defendant expressly or impliedly consents to have the trier of fact consider a nonincluded offense"); *West*, 477 P.2d at 420 (citing the "practice of reduction to a count that bears some categoric similarity to the original charge" and noting that homicide might be reduced from murder to manslaughter or perhaps to assault, but "grossly inconsistent offenses, such as larceny or possession of narcotics are never arbitrarily used in place of murder unless these offenses were part of the actual conduct involved." (citation omitted)).

whether Respondent was convicted as an accessory after the fact. *See Shepard*, 544 U.S. at 17 (citing *Taylor*, 495 U.S. at 602).[62]

3. The Modified Categorical Analysis Pursuant To The Alternate Grounds For Affirmance Likewise Favors Respondent

Finally, if the Court were to inquire into the modified categorical approach regarding the other two alternate grounds for affirmance, *see* Parts II and III, Respondent would also prevail.

If this Court concludes that California aiding and abetting liability exceeds that which is included in the generic definition, the modified analysis favors Respondent. The Government concedes (Br. 31-32) that the charging document in this case applies equally to principals and aiders and abettors. Thus, the charging document does not reveal whether Respondent was convicted as principal or as aider and abettor pursuant to California's natural and probable consequences doctrine. Accordingly, it cannot be said that Respondent was necessarily convicted of a "theft offense" under the INA.

Similarly, if the Court agrees with Respondent that California Vehicle Code § 10851 permits convictions without the requisite mens rea for a "theft offense," the Court should hold for Respondent under the modified approach. Indeed, in this particular analysis, the charging document is singu-

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[62] This Court's statement in *Shepard* that a charging document may reveal whether a conviction falls within a generic definition, 544 U.S. at 20-21, does not suggest otherwise. While charging documents may be *considered* as part of a modified categorical inquiry, they by no means necessarily *resolve* whether a particular conviction was within the generic definition in any particular case. *See Taylor*, 495 U.S. at 602 (modified approach resolves inquiry "in a narrow range of cases" in which certain documents establish that the defendant was "necessarily" convicted of the generic offense); *cf. id.* (jury instruction can resolve an inquiry in a conviction-by-jury case only if the instructions "actually required the jury to find all of the elements" of the generic offense).

larly unhelpful to the Government. It expressly notes that the alleged offense was committed "with the intent to permanently or temporarily deprive" the owner of title or possession and "*with or without intent to steal* the vehicle." Pet. App. 13a (emphasis added). Thus, the modified categorical inquiry is manifestly inconclusive—it cannot be said that Respondent was "necessarily" convicted of a "theft offense" under the INA.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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NOVEMBER 2006

Supreme Court, U.S.
FILED
NOV 27 2006
OFFICE OF THE CLERK

(10)

No. 05-1629

In the Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
PETITIONER

v.

LUIS ALEXANDER DUENAS-ALVAREZ

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

In *Penuliar* v. *Gonzales*, 435 F.3d 961, 970 n.6 (2006), petition for cert. pending, No. 05-1630 (filed June 22, 2006), on which the decision below relied, the Ninth Circuit held that "aiding and abetting liability is [not] included in the generic definition of a 'theft offense'" under 8 U.S.C. 1101(a)(43)(G). This Court granted certiorari to decide whether that holding is correct. See Pet. I. Respondent now concedes that it is not. Br. 5. He instead contends that the California vehicle-theft statute is broader than the generic definition of "theft offense," not because the former reaches aiding and abetting and the latter does not, but for three *other* asserted reasons: (1) the California statute reaches a limited class of aiders and abettors under a "natural and probable consequences" theory and the generic definition does not; (2) the California statute reaches accessories after the fact and the generic definition does not; and (3) the California statute reaches thefts in which the defendant intends to deprive the owner of his property temporarily and the generic definition does not. As explained below, each of those contentions lacks merit.

A. The Fact That The California Statute Covers A Limited Class Of Aiders and Abettors Under A "Natural And Probable Consequences" Theory Does Not Preclude A Finding That Respondent Was Convicted Of A "Theft Offense"

Respondent contends that the California vehicle-theft statute is broader than the generic definition of "theft offense" because (a) a defendant in California can be guilty of aiding and abetting an additional crime committed by the principal that is a "natural and probable consequence" of the crime the defendant intended to aid and abet and (b) the "natural and probable consequences" rule is assertedly not followed by the

majority of States and therefore not part of the "generic" aiding-and-abetting component of a generic "theft offense." Br. 15-27; accord Cal. Pub. Defenders Ass'n (CPDA) Amicus Br. 14-17; Professors of Crim. Law (Law Professors) Amicus Br. 19-26. Respondent is mistaken.

1. In *Taylor* v. *United States*, 495 U.S. 575 (1990), this Court held that the "generic" definition of "burglary" in 18 U.S.C. 924(e) is the "sense in which the term is now used in the criminal codes of most States." 495 U.S. at 598; accord *id.* at 589. The Court did *not* say, however, that a particular State's criminal statute satisfies that generic definition only if the law of that State reflects the majority rule with respect to every conceivable legal issue that might arise under the statute. Instead, the Court made clear that a state statute need only have the "basic elements" of the generic definition, and need only "substantially correspond[]" with it. *Id.* at 599, 602.

The Second Circuit employed that common-sense approach in *United States* v. *Hathaway*, 949 F.2d 609 (1991) (per curiam), cert. denied, 502 U.S. 1119 (1992). In addition to holding that the generic definition of "arson" includes aiding and abetting, *id.* at 610-611; see U.S. Br. 16, the court held in that case that "minor variations in a state's arson statute are of no consequence provided that the state's statute *essentially corresponds in substance* to the generic definition of the crime," 949 F.2d at 611 (emphasis added). The court therefore concluded that the Vermont statute satisfied the generic definition even though its monetary threshold of property damage for arson was "toward the lower end of the * * * scale" among the States. *Ibid.*

That approach makes sense in assessing state statutes under *Taylor* and the Immigration and Nationality Act (INA) because, under "Our Federalism," there will almost always be some variation in the law among the States. Congress pre-

sumably recognized that States have the primary role in dealing with crime and that the details of state criminal laws can and should vary. And when Congress assigned federal-law consequences to prior state criminal convictions, it could not have intended that an alien would be able to avoid being classified as an aggravated felon simply by pointing to one aspect of the law of the State in which he was convicted that reflects the minority view. Nor could it have intended to require an immigration judge (IJ), the Board of Immigration Appeals (BIA), and the reviewing court to conduct a 50-State survey in each case on every wrinkle of a particular State's criminal law. The "aggravated felony" provision must be interpreted in a workable manner, because "Congress clearly intended to facilitate an efficient removal process, especially in aggravated felony cases." *Conteh* v. *Gonzales*, 461 F.3d 45, 56 (1st Cir. 2006). Going beyond the "basic elements" would be particularly problematic in determining the "generic" meaning of aiding and abetting, because every criminal statute can be violated by aiding and abetting, and the "generic" meaning thus potentially affects the definition of every aggravated felony.

As respondent acknowledges (Br. 16-17), the "basic elements" of "generic" aiding and abetting are (1) assisting in the commission of a crime (2) with the intent to promote or facilitate its commission. See, *e.g.*, 2 Wayne R. LaFave, *Substantive Criminal Law* § 13.2 at 337 (2d ed. 2003) (LaFave). Because that is the law in California, *e.g.*, *People* v. *Celis*, 46 Cal. Rptr. 3d 139, 142 (Ct. App. 2006), it applies the "generic" version of aiding and abetting. And it does so regardless of whether California is in the majority or minority with respect to the narrow question of aiding-and-abetting law on which respondent focuses: whether foreseeability is sufficient, or some other mens rea is necessary, in the limited category of cases involving an aider and abettor's liability for a crime

committed by the principal that is different from the one he intended to aid and abet. A contrary approach would render the basic framework of *Taylor* unworkable by allowing a remote prospect—that an alien who pleaded guilty to a crime was, in fact, guilty only under a particular species of aiding-and-abetting liability—to permit an alien to escape the consequences of a conviction, even though it is overwhelmingly likely that he was guilty as a principal (or as a typical aider and abettor).

2. Even if the "natural and probable consequences" rule were relevant in determining the "generic" meaning of aiding and abetting, respondent's contention would still lack merit, because "generic" aiding and abetting encompasses that rule. "Natural and probable consequences" was the rule at common law; contrary to respondent's contention (Br. 21), it is the majority rule in the States; and it is the rule in federal courts.

a. In *Taylor*, this Court held that the term "burglary," as used in 18 U.S.C. 924(e) to identify past convictions that subject defendants to an enhanced sentence, is not confined to burglary as defined at common law, but instead has an expansive "generic" definition whose basic elements are drawn from the modern criminal codes of the States. The Court reasoned that Congress presumably intended to *include* common-law burglary, but also intended a definition that did not depend on common-law distinctions and was consistent with the practicalities of modern law enforcement and the purposes of the sentence-enhancement provision. 495 U.S. at 592-594.

The "natural and probable consequences" rule was an established feature of aiding and abetting at common law. See, *e.g.*, *People* v. *Robinson*, 715 N.W.2d 44, 49 (Mich. 2006); *State* v. *Richmond*, 90 S.W.3d 648, 654 (Tenn. 2002). As with the term "burglary" in 18 U.S.C. 924(e), Congress must have intended to include the common-law understanding of aiding and abetting in the generic definition of "theft offense" and

the other aggravated felonies in 8 U.S.C. 1101(a)(43). That would be true even if a majority of States had moved away from the "natural and probable consequences" rule or might do so in the future. Absent a situation in which federal law and the law of virtually all States had abandoned the common law at the time of enactment, the generic offense should, at a minimum, include what the common law covered.

b. In any event, a majority of the States have *not* moved away from the common-law rule; more States continue to apply the rule than have rejected it. Professor LaFave, who describes the "natural and probable consequences" rule as the "established" one, identifies nine States, in addition to California, that apply it: Delaware, Illinois, Indiana, Iowa, Kansas, Maine, Minnesota, Tennessee, and Wisconsin. See LaFave § 13.3(b) at 361-362 nn.27-29 (2d ed. 2003 & Supp. 2007). Some version of the rule is also applied in twelve other States: Florida, Georgia, Idaho, Louisiana, Maryland, Michigan, Missouri, Nebraska, Rhode Island, South Carolina, Texas, and West Virginia.[1] Respondent contends (Br. 21-23) that at least 29 States (as well as the District of Columbia)

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[1] See, *e.g.*, *Beasley* v. *State*, 360 So. 2d 1275, 1278 (Fla. Ct. App. 1978) ("natural or probable consequence"); *Crawford* v. *State*, 435 S.E.2d 64, 65 (Ga. Ct. App. 1993) (same); *State* v. *Rodoussakis*, 511 S.E.2d 469, 488 (W. Va. 1998) (same); *State* v. *Ehrmantrout*, 595 P.2d 1097, 1097 (Idaho 1979) (per curiam) ("natural and probable consequence"); *Robinson*, *supra* (same); *State* v. *Leonor*, 638 N.W.2d 798, 807 (Neb. 2002) (same); *Hudgins* v. *Moore*, 524 S.E.2d 105, 108 n.5 (S.C. 1999) (same); *State* v. *Wiley*, 880 So. 2d 854, 864 (La. Ct. App.) ("foreseeable consequences"), writ denied, 885 So. 2d 585 (La. 2004); *Sheppard* v. *State*, 538 A.2d 773, 776 n.3 (Md. 1988) (conduct "in furtherance of the commission of the offense and the escape therefrom"); *State* v. *Evans*, 694 S.W.2d 860, 863 (Mo. Ct. App. 1985) (conduct that "defendant knew [of] or could reasonably anticipate"); *State* v. *Lambert*, 705 A.2d 957, 963-964 (R.I. 1997) ("natural, or reasonable, or probable consequences"); *Gordon* v. *State*, 640 S.W.2d 743, 758 (Tex. Ct. App. 1982) ("foreseeable, ordinary and probable consequences").

either have explicitly rejected the rule or have enacted statutes or issued judicial decisions that are inconsistent with it. That is not correct. The statutes and judicial decisions cited by respondent (Br. 22-23 nn.23-25) reflect that only the District of Columbia and 13 States—Alaska, Arizona, Colorado, Connecticut, Hawaii, Kentucky, Montana, Nevada, New Hampshire, New Mexico, Pennsylvania, Vermont, and Washington—can fairly be said to apply a rule that fundamentally differs from the "natural and probable consequences" rule. With respect to the remaining 16 States identified by respondent, the statutes and judicial decisions he cites do not specifically address the question whether a defendant can be liable under an aiding-and-abetting theory for an additional crime that is the natural and probable consequence of the crime he intended to facilitate or promote. And in several of those States, there are judicial decisions that do address that question, and explicitly *adopt* a version of the "natural and probable consequences" rule. See note 1, *supra*.

By our count, therefore, at least 22 jurisdictions apply the rule and no more than 14 have rejected it. In fact, the relevant split is even less favorable to respondent than that, because at least two of the jurisdictions that have rejected the rule did so only recently. See *Wilson-Bey* v. *United States*, 903 A.2d 818 (D.C. 2006) (overruling prior decisions); *Sharma* v. *State*, 56 P.3d 868 (Nev. 2002) (per curiam) (same). Those jurisdictions *applied* the rule at the time "theft offense" was added to the aggravated-felony provision, which, as respondent recognizes, is "[t]he most relevant time for determining [the] statutory term's meaning." Br. 31 n.36 (citation omitted). There is thus no basis, even under respondent's theory, for concluding that "generic" aiding and abetting excludes liability under a "natural and probable consequences" theory.

c. The federal courts of appeals have also applied the "natural and probable consequences" rule in cases involving the

federal aiding-and-abetting statute, 18 U.S.C. 2.[2] That is significant, because courts consider federal as well as state law in determining the "generic" definition of aggravated felonies.[3] Indeed, for at least two reasons, federal law should have *substantial* weight in determining what Congress included in the "generic" meaning of the aiding-and-abetting component of an aggravated felony.

First, construing "generic" aiding and abetting under the INA to be narrower than aiding and abetting under 18 U.S.C. 2 would attribute to Congress the quite anomalous intent to include aiding-and-abetting liability under a "natural and probable consequences" theory for purposes of the federal criminal laws but not for purposes of the federal immigration laws. It would mean that a person convicted of (for example) aiding and abetting a murder under that theory, see, *e.g.*, 18 U.S.C. 1111 (2000 & Supp. IV 2004), would be subject to the same criminal penalties as a principal, potentially including life in prison, but not to the same immigration consequences. It is highly unlikely that Congress intended such a result.

Second, if respondent's view were correct, *no* alien convicted of a federal murder, rape, burglary, theft, or fraud of-

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[2] See, *e.g.*, *United States* v. *Edwards*, 303 F.3d 606, 637 (5th Cir. 2002), cert. denied, 537 U.S. 1192 and 1240 (2003); *United States* v. *Walker*, 99 F.3d 439, 443 (D.C. Cir. 1996); *United States* v. *Miller*, 22 F.3d 1075, 1078-1079 (11th Cir. 1994); *United States* v. *Moore*, 936 F.2d 1508, 1527 (7th Cir.), cert. denied, 502 U.S. 991 (1991); *United States* v. *Graeme*, 774 F.2d 106, 108 n.1 (6th Cir. 1985), cert. denied, 474 U.S. 1068 and 1069, and 475 U.S. 1017 (1986); *United States* v. *Barnett*, 667 F.2d 835, 841 (9th Cir. 1982); *United States* v. *DeLaMotte*, 434 F.2d 289, 293 (2d Cir. 1970), cert. denied, 401 U.S. 921 (1971).

[3] See, *e.g.*, *Morales-Alegria* v. *Gonzales*, 449 F.3d 1051, 1056 (9th Cir. 2006) ("forgery" under 8 U.S.C. 1101(a)(43)(R)); *Ming Lam Sui* v. *INS*, 250 F.3d 105, 115 (2d Cir. 2001) ("attempt" under 8 U.S.C. 1101(a)(43)(U)); *Lara-Ruiz* v. *INS*, 241 F.3d 934, 940 (7th Cir. 2001) ("sexual abuse of a minor" under 8 U.S.C. 1101(a)(43)(A)); see also *In re V-Z S*, 22 I. & N. Dec. 1338, 1342 (B.I.A. 2000) (en banc) ("theft offense" under 8 U.S.C. 1101(a)(43)(G)).

fense (to name only a few) would be deemed an aggravated felon, see 8 U.S.C. 1101(a)(43)(A), (G) and (M)(i), unless the government could prove that the alien was not convicted as an aider and abettor under a "natural and probable consequences" theory. If that were so, a federal offense of that type would never be deemed an aggravated felony as a "categorical" matter, because every conviction under a federal statute might theoretically rest on such a basis, and a federal offense of that type would only rarely be deemed an aggravated felony under the "modified categorical" approach, because, as difficult as it would be to establish that an alien was not convicted as an aider and abettor, see U.S. Br. 22-24, it would be more difficult still to establish that he was not convicted under a particular theory of aiding and abetting. Indeed, under respondent's approach, it would be rare for an alien to be found to be an aggravated felon based on a conviction from *any* jurisdiction that applies the "natural and probable consequences" rule (including California, Florida, Illinois, and Texas, four of the most populous States). It is highly unlikely that Congress intended that result either, particularly since the overwhelming majority of aliens whose status as aggravated felons could not be established under respondent's rule would in fact be principal offenders or aiders and abettors of "target" rather than "second" crimes (Resp. Br. 17), and thus would indisputably qualify for that status.

B. Respondent Was Convicted Of A "Theft Offense" Regardless Of Whether The California Statute Covers Accessories After The Fact

Respondent also contends that the California vehicle-theft statute is broader than the generic definition of "theft offense" because (a) the California statute covers "accessor[ies]," Cal. Veh. Code § 10851(a) (West 2000); (b) "accessory" in that statute assertedly has the same meaning as in California Penal Code § 32 (West 1999), where

it means accessory after the fact; and (c) the generic definition of "theft offense" does not cover accessories after the fact. Br. 7-15; accord CPDA Amicus Br. 17-19. That contention likewise affords respondent no basis for relief.

1. In our opening brief, we pointed out that, even if Section 32 of the California *Penal* Code defined a term ("accessory") rather than identifying a separate substantive offense, it is not clear that the definition would apply in the California *Vehicle* Code. U.S. Br. 29. Respondent cites no decision holding that it does. In our opening brief, we also cited California authority that addresses the meaning of the statutory phrase "any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing," Cal. Veh. Code § 10851(a), and noted that that authority suggests that the phrase is merely shorthand for aider and abettor. U.S. Br. 29-30 & n.17. Respondent disparages that authority (Br. 13 & nn.12-13), but he does not cite any authority that offers a different interpretation of the statutory phrase.

Respondent's basic submission (Br. 8-13) is that "accessory" in Section 10851(a) of the Vehicle Code could only have the meaning that the term has in Section 32 of the Penal Code. But Section 10851(a) also refers to an "accomplice," which is defined in California Penal Code § 1111 (West 2004) as a particular type of trial witness (and in a manner that includes a principal), and to a "party," which, as far as we are aware, is not defined anywhere in California's criminal statutes. It is hardly unreasonable, therefore, to conclude that "accessory" is also used in a different sense in Section 10851(a), and that the three terms together are merely a formulation for including aiders and abettors, as the authorities we cite indicate.

As we explain in our opening brief (at 30-32), however, it is ultimately irrelevant whether Section 10851(a) reaches accessories after the fact. Even if it does, even if the statute on its

face is therefore broader than the generic definition of "theft offense," and even if a violation of Section 10851(a) is for that reason not a "theft offense" as a "categorical" matter, the government has still demonstrated that respondent was convicted of a "theft offense" under the "modified categorical" approach. That is because respondent was charged as a principal (Pet. App. 13a), and a defendant charged with a principal violation can be convicted of aiding and abetting (which is included in the generic definition) but not of being an accessory after the fact (which is not). See Gov't Br. 30-32.

2. Quoting *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947), respondent contends that a holding by this Court that he was convicted of a "theft offense" under the "modified categorical" approach would violate the "fundamental rule of administrative law" that a reviewing court "must judge the propriety of [agency] action solely by the grounds invoked by the agency." Br. 40. Since the IJ and BIA apparently found that a violation of California Vehicle Code § 10851(a) is *categorically* a "theft offense," see Pet. App. 3a-10a, respondent urges the Court to "remand to the agency for consideration under the modified approach" (Br. 40). Respondent quotes *Chenery* selectively. The "fundamental rule of administrative law" identified in that case is not that a reviewing court *invariably* may sustain an agency decision only on the grounds invoked by the agency, but that it is so confined when "dealing with a determination or judgment which an administrative agency alone is authorized to make." 332 U.S. at 196. Here, whether the state crime of which respondent was convicted satisfies the federal definition of "theft offense" is not a determination that the BIA alone is authorized to make.

To begin with, that determination does not entail the exercise of any discretion granted to the agency. Nor, contrary to respondent's contention, does it entail "a highly fact-bound inquiry." Br. 41. Instead, in the circumstances of this case,

it presents a relatively unusual instance of a pure question of law, and one as to which a remand to the agency is not required. While deference is owed under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), to the BIA's interpretation of the term "theft offense" in the INA (because the BIA is charged with administering the INA), see pp. 17-18, *infra*, courts have not deferred to the BIA's determination that a particular state or federal offense satisfies the definition of "theft offense" (because the BIA is not charged with administering state or federal criminal laws), see, *e.g.*, *Soliman* v. *Gonzales*, 419 F.3d 276, 281 (4th Cir. 2005); *Abimbola* v. *Ashcroft*, 378 F.3d 173, 176 (2d Cir. 2004), cert. denied, 126 S. Ct. 734 (2005). In many instances, the determination of whether a particular state or federal conviction is an aggravated felony will also require some interpretation of the INA's aggravated-felony provision, which should be left to the BIA in the first instance. In this case, however, it is conceded that the conduct of an accessory after the fact is not included in the generic definition of "theft offense," so no remand is required for that purpose. The Court can determine itself whether the charge in the information to which respondent pleaded guilty encompasses a theory of liability that is not covered by the generic definition of "theft offense."

3. Respondent contends (Br. 41-48) that, if the Court does apply the "modified categorical" approach, it should rule for him. He makes two alternative arguments in support of that claim. Each lacks merit

a. Respondent's first theory is that the rule that a defendant charged as a principal cannot be convicted as an accessory after the fact applies only in an "ordinary case" (Br. 43) and that this is not an ordinary case, because Section 10851(a) "expressly reaches accessories after the fact," thereby "eviscerating the distinction between accessories after the fact and principals" and "making the accessory liable for the substan-

tive crime" (Br. 44). That theory is erroneous. As respondent acknowledges (Br. 8), the crime of being an accessory after the fact is universally regarded as separate and distinct from the underlying offense, and there is no basis in law or logic for making applicability of that rule depend on whether the legislature chooses to place the accessory-after-the-fact provision in the same subsection as the underlying offense, in a separate subsection of the same statute, or in an entirely different statute. Assuming that "accessory" in California Vehicle Code § 10851(a) does mean accessory after the fact, the inclusion of the term no more makes an accessory after the fact to vehicle theft a principal than the inclusion of the term "conspires" in 18 U.S.C. 1951(a) abolishes the distinction between obstructing interstate commerce by robbery or extortion and conspiracy to commit that offense, such that a defendant charged with the substantive offense can be convicted of conspiracy, see *Callanan* v. *United States*, 364 U.S. 587 (1961) (holding that they are separate offenses).[4]

The sole authority on which respondent relies (Br. 44) is *People* v. *Prado*, 136 Cal. Rptr. 521 (Ct. App. 1977), which states that, "*in the absence of statute*, an accessory after the fact must be indicted and convicted as such, and * * * a person charged in an indictment as principal cannot be convicted on evidence showing him to be only an accessory after the fact." *Id.* at 523 (emphasis added; citation omitted). The obvious point of the italicized phrase, however, is merely that a legis-

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[4] Numerous federal statutes prohibit the substantive offense, conspiracy to commit the offense, and attempt to commit the offense in the same paragraph. See, *e.g.*, 18 U.S.C. 81 (Supp. IV 2004) (arson); 18 U.S.C. 115 (2000 & Supp. IV 2004) (kidnap or murder of federal official); 18 U.S.C. 1951(a) (Hobbs Act robbery or extortion); 18 U.S.C. 1959(a) (violent crime in aid of racketeering); 18 U.S.C. 2251(e) (Supp. IV 2004) (sexual exploitation of children). Yet it is clear under federal law that a substantive offense, a conspiracy, and an attempt are separate crimes. U.S. Br. 25 & n.14.

lature may provide by statute that an accessory after the fact *need not* "be indicted and convicted as such" and that, if a legislature does so provide, a person charged in an indictment as a principal *can* "be convicted on evidence showing him to be only an accessory after the fact." California Vehicle Code § 10851(a) does not so provide, even though the California Legislature has demonstrated that it knows how to write such a statute. See Cal. Penal Code § 971 (West 1985) ("no other facts need be alleged in any accusatory pleading against [an aider and abettor] than are required in an accusatory pleading against a principal").

b. Respondent's second theory is that California courts permit "informal, oral amendment of accusatory pleadings," such that the written information "may not be reflective of the actual information in place at the time of the plea"; that California courts also allow a guilty plea to "a crime that is different from that described in the written information without amending the information," as long as the crime is "reasonably related" to the charged crime; and that, accordingly, "one charged as a principal" under California Vehicle Code § 10851(a) "may, in fact, have pleaded guilty as an accessory after the fact." Br. 46-47. That theory is equally erroneous.

As an initial matter, the abstract of judgment in this case reflects that respondent pleaded guilty to the charge in count one of the information, which the abstract of judgment identifies as "auto theft" in violation of Section 10851(a). Pet. App. 11a. That document therefore demonstrates that respondent pleaded guilty to the crime with which he was charged, not to some other one.[5]

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[5] Respondent suggests (Br. 42 n.54) that courts may not rely upon an abstract of judgment in determining whether a California conviction is for an aggravated felony. But he did not object to the use of that document before the agency, and his claim has therefore been forfeited. See 8 U.S.C. 1252(d)(1). In any event, the INA explicitly provides that "[a]n abstract of a record of

Even if the language in the abstract of judgment were thought to be broad enough to encompass the possibility that respondent was convicted as an accessory after the fact (assuming Section 10851(a) reaches that offense), respondent's theory still would not be a viable one. If the mere possibility that an alien pleaded guilty to an offense other than the one reflected in the charging instrument were sufficient to defeat a finding of aggravated-felony status in a case in which the language in the judgment is broad enough to encompass both the charged offense and some other offense that is not an aggravated felony, producing the charging instrument and corresponding judgment in such a case would never be sufficient to establish that the alien was convicted of an aggravated felony. Under respondent's theory, for example, if an information charged the defendant with entering a house with intent to commit a felony in violation of the California burglary statute, Cal. Penal Code § 459 (West 1999), and the judgment reflected a plea to "burglary" in violation of that provision, the government would be unable to rely on those documents to establish that the defendant was convicted of generic burglary, see *Taylor*, 495 U.S. at 598-599, because it is theoretically possible that the defendant in fact pleaded guilty to entering a *vessel* with the intent to commit a felony (a non-generic burglary, see *id.* at 599, that is also covered by the statute), even though he was not charged with that offense. The government in such a case would presumably have to produce a "transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant." *Shepard* v. *United States*, 544 U.S.

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conviction" constitutes "proof of a criminal conviction" in removal proceedings, 8 U.S.C. 1229a(c)(3)(B)(v), and the Ninth Circuit has found a California abstract of judgment, in combination with the charging instrument, sufficient to establish the offense of which the alien was convicted, *e.g.*, *United States* v. *Velasco-Medina*, 305 F.3d 839, 852 (2002), cert. denied, 540 U.S. 1210 (2004).

13, 26 (2005). But plea colloquies do not always reflect the precise theory of liability; even when they do, they are not always transcribed; and even when they are, the transcripts are not always available. See U.S. Br. 23.

The consequence of respondent's theory, therefore, is to allow a mere theoretical possibility to render the *Taylor* framework wholly unworkable and allow a substantial number of aliens who are in fact aggravated felons to avoid being treated as such based on remote speculation. Congress could not have intended that result. The government and the courts should be entitled to presume that a charging instrument and corresponding judgment establish that the alien was convicted of the charged crime, and the alien should bear the burden of demonstrating that he *in fact* was convicted of a different crime. Because respondent was charged with "driv[ing]" or "tak[ing]" a vehicle, Pet. App. 13a, and he has produced no evidence that he instead pleaded guilty to being an accessory after the fact (or any other crime, for that matter), the record establishes that he was convicted of a "theft offense."

C. The Fact That The California Statute Covers Thefts In Which A Temporary Deprivation Is Intended Does Not Preclude A Finding That Respondent Was Convicted Of A "Theft Offense"

Respondent also contends that the California vehicle-theft statute is broader than the generic definition of "theft offense" because the California statute covers thefts in which the defendant intends to deprive the owner of his property temporarily and the generic definition of "theft offense" assertedly does not. Resp. Br. 27-39; accord CPDA Amicus Br. 5-14; Law Professors Amicus Br. 5-19. That contention is also mistaken.

1. As an initial matter, the contention is not properly before the Court. Respondent's claim regarding the proper

mens rea for a generic "theft offense" was not raised in his brief in opposition, and thus, in accordance with the Court's ordinary practice, it should be "deemed waived." Sup. Ct. R. 15.2.; see, *e.g.*, *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 212 n.2 (2004); *Household Credit Servs., Inc.* v. *Pfennig*, 541 U.S. 232, 240 n.3 (2004); *Alabama* v. *Shelton*, 535 U.S. 654, 660 n.3 (2002). Deeming the argument waived is particularly appropriate because "the Ninth Circuit did not address the[e] argument" below, *Baldwin* v. *Reese*, 541 U.S. 27, 34 (2004); see Pet. App. 1a-2a, and the absence of any circuit conflict on the issue, see p. 18, *infra*, means that it is not "of sufficient general importance to justify the grant of certiorari," *United States* v. *Nobles*, 422 U.S. 225, 242 n.16 (1975).

Nor should respondent's waiver be excused on the theory that the issue is "a 'predicate to an intelligent resolution' of the question presented, and therefore 'fairly included therein.'" *Ohio* v. *Robinette*, 519 U.S. 33, 38 (1996) (quoting *Vance* v. *Terrazas*, 444 U.S. 252, 258 n.5 (1980), and Sup. Ct. R. 14.1(a)). The question presented in this case is whether a generic "theft offense" includes aiding and abetting. Pet. I. The question of the appropriate mens rea for a generic "theft offense" by a *principal* may at some level be "related," or even "complementary," to that question, but "[a] question which is merely 'complementary' or 'related' to the question presented in the petition for certiorari is not '"fairly included therein."'" *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 31-32 (1993) (per curiam) (quoting *Yee* v. *City of Escondido*, 503 U.S. 519, 537 (1992)); see also *NYNEX Corp.* v. *Discon, Inc.*, 525 U.S. 128, 140 (1998); *Melendez* v. *United States*, 518 U.S. 120, 125 n.2 (1996).

Respondent contends that the government's argument in Point B of its opening brief has put the question of the appropriate mens rea element "directly at issue." Resp. Br. 29 n.33. The argument to which respondent refers, however, see U.S.

Br. 27-32, simply addresses the application of the legal rule the government advocates in Point A of its opening brief—that a "theft offense" includes aiding and abetting—to the circumstances of this case. It is quite difficult to see how that argument, which *is* fairly included within the question presented, could be thought to have opened the door to an argument about an entirely separate aspect of the generic definition of "theft offense."[6]

2. If the Court decides to address respondent's claim, it should be rejected. Respondent's basic submission is that "the brief taking of property with the intent to return it does not satisfy the mens rea requirement for a theft offense." Br. 31; accord Br. 38. The BIA, however, has interpreted "theft offense" in 8 U.S.C. 1101(a)(43)(G) to mean "a taking of property * * * [with] criminal intent to deprive the owner of the rights and benefits of ownership, *even if such deprivation is less than total or permanent*." *In re V-Z-S-*, 22 I. & N. Dec. 1338, 1346 (B.I.A. 2000) (en banc) (emphasis added). Because the BIA administers the INA, its interpretation of that provision is "entitled to *Chevron* deference if reasonable," *Ming Lam Sui* v. *INS*, 250 F.3d 105, 113 (2001); accord *Soliman*, 419 F.3d at 281; see *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999), whether or not the Court would have come to the same conclusion in the first instance, *Chevron*, 467 U.S. at

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[6] Respondent's argument that "generic" aiding and abetting does not include the "natural and probable consequences" rule was also not raised in the brief in opposition, but, unlike the mens rea argument, it *can* be said to be fairly included in the question presented, because it involves the scope of "generic" aiding and abetting and can therefore be regarded as "a predicate to the intelligent resolution" of the question presented. Conversely, respondent's argument that the California vehicle-theft statute reaches accessories after the fact *was* raised in the brief in opposition (at 17-26), but it probably *cannot* be said to be fairly included in the question presented. As explained above, however, see p. 10, *supra*, the Court can resolve the case by assuming without deciding that respondent's position on that issue is correct.

843 n.11. As the Second Circuit has correctly held, "the BIA's interpretation of 'theft offense' is reasonable." *Abimbola*, 378 F.3d at 176; see also *Jaggernauth* v. *United States Att'y Gen.*, 432 F.3d 1346, 1353 (11th Cir. 2005) (applying BIA definition). Indeed, the Seventh, Ninth, and Tenth Circuits have adopted an almost identical definition of "theft offense" based on a de novo interpretation of the INA. See *Hernandez-Mancilla* v. *INS*, 246 F.3d 1002, 1009 (7th Cir. 2001); *United States* v. *Vasquez-Flores*, 265 F.3d 1122, 1125 (10th Cir. 2001), cert. denied, 534 U.S. 1165 (2002); *United States* v. *Corona-Sanchez*, 291 F.3d 1201, 1205 (9th Cir. 2002) (en banc). And, as far as we are aware, no court of appeals has adopted respondent's proposed definition.

The BIA's conclusion—that, even if the common-law definition of "larceny" requires an intended *permanent* deprivation, the statutory definition of "theft offense" does not, see *In re V-Z-S-*, 22 I. & N. Dec. at 1341-1346—reflects a permissible interpretation of the INA for a number of reasons. First, as the Seventh Circuit observed in adopting a definition of "theft offense" similar to the BIA's, "'theft' encompasses many crimes, which indicates that any definition ought to be broad." *Hernandez-Mancilla*, 246 F.3d at 1008; see *United States* v. *Turley*, 352 U.S. 407, 414 (1957) ("theft" is "generally considered to be broader than 'common-law larceny'"). Second, as the en banc Ninth Circuit observed in adopting the Seventh Circuit's definition, "Congress used the words 'theft offense' rather than just 'theft,' thus indicating that the phrase ought [to] be read to incorporate different but closely related constructions in modern state statutes." *Corona-Sanchez*, 291 F.3d at 1205; accord *Hernandez-Mancilla*, 246 F.3d at 1008 ("by choosing the words 'theft offense' rather than just 'theft,' * * * Congress indicated that the phrase ought to be given a

broad read").[7] Third, as the BIA itself observed, terms such as "steal" and "embezzle" in federal criminal statutes have long been interpreted *not* to require an intent to deprive the owner of his property permanently, *In re V-Z-S-*, 22 I. & N. Dec. at 1343-1344 (discussing 18 U.S.C. 641, 661, 2312 and 2313), and it would be anomalous if Congress had intended that some federal theft crimes would not constitute a "theft offense" under the INA, see *id.* at 1345 n.8.

A violation of the California vehicle-theft statute is a "theft offense" because the mens rea element in the statute is no broader than that in the BIA's definition. The California statute requires "intent either to permanently or temporarily deprive the owner * * * of his or her title to or possession of the vehicle," Cal. Veh. Code § 10851(a); the INA as interpreted by the BIA requires "criminal intent to deprive the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent," *In re V-Z-S-*, 22 I. & N. Dec at 1346. Respondent suggests that the phrase "less than total or permanent" can be understood to "cover[] intent to effect certain non-permanent deprivations—*i.e.*, those that appropriate a major portion of the economic value of the property taken—but exclude[] brief or momentary de-

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[7] Many States (in addition to California) have statutory offenses that involve a taking of property with the intent to deprive the owner of the property temporarily. See, *e.g.*, Kan. Stat. Ann. § 21-3705 (Supp. 2004) (criminal deprivation of property); La. Rev. Stat. Ann. § 47:818.36 (2006) (unlawful use of tax collected); Mo. Ann. Stat. § 411.770 (West 2001) (stealing grain); N.C. Gen. Stat. § 14-82 (2005) (taking horses, mules, or dogs for temporary purposes); Okla. Stat. Ann. tit. 47, § 4-102 (West 2000) (unauthorized use of vehicle or implement of husbandry); Utah Code Ann. § 76-6-404.5 (2003) (wrongful appropriation); Va. Code Ann. § 18.2-58.1 (2004) (carjacking); Vt. Stat. Ann. tit. 13, § 3833 (1998) (unlawful taking of tangible personal property); W. Va. Code Ann. § 29-2A-13 (LexisNexis 2004) (unauthorized taking or operation of aircraft); Wyo. Stat. Ann. § 6-5-110 (2005) (wrongful appropriation of public property).

privations with an intent to return" (Br. 39 n.50), in which case the California statute would be broader than the generic definition. But such an understanding is foreclosed by the fact that, in the very case in which it adopted a definition of "theft offense" that includes the phrase, the BIA determined that the California vehicle-theft statute satisfies the definition. See 22 I. & N. Dec. at 1346-1352. It could not have reached that conclusion if respondent's suggested understanding of the phrase were correct.[8]

* * * * *

For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

NOVEMBER 2006

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[8] Respondent also suggests that a violation of Section 10851(a) cannot be a "theft offense" because, in the case in which the BIA adopted the definition of that term, it "suggested that joyriding is not a theft offense," and joyriding in California "is punishable—and only punishable—under § 10851." Br. 38-39 n.49. At the time of the conviction under consideration in the BIA case, however, joyriding was punishable under California Penal Code § 499b (West 1995), which, unlike Section 10851(a), required a specific "intent to use or operate another's vehicle without the owner's consent" but did not require an "intent to deprive the owner of his property," *In re V-Z-S*, 22 I. & N. Dec. at 1348, a distinction stressed by the California Supreme Court, see *id.* at 1349 (citing *People* v. *Thomas*, 373 P.2d 97, 101 (Cal. 1962), appeal dismissed and cert. denied, 371 U.S. 231 (1963)). Insofar as the BIA suggested that joyriding is not a "theft offense," therefore, it was referring only to a joyriding conviction under Section 499b. See *id.* at 1348-1349; cf. *United States* v. *Perez-Corona*, 295 F.3d 996, 1001 (9th Cir. 2002) (holding that violation of Arizona joyriding statute is not "theft offense" because it does not require *any* "intent to deprive the owner of his property").

APPENDIX

8 U.S.C.1101(a)(43) (2000 & Supp. IV 2004) provides:

The term "aggravated felony" means—

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficing crime (as defined in section 924(c) of Title 18);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of Title 18) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of Title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

(E) an offense described in—

(i) section 842(h) or (i) of Title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of Title 18 (relating to firearms offenses); or

(iii) section 5861 of Title 26 (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense)

for which the term of imprisonment [is] at least one year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year;

(H) an offense described in section 875, 876, 877, or 1202 of Title 18 (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of Title 18 (relating to child pornography);

(J) an offense described in section 1962 of Title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;

(K) an offense that—

(i) relates to the owning, controlling, managing, or supervising of a prostitution business;

(ii) is described in section 2421, 2422, or 2423 of Title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii) is described in any of sections 1581-1585 or 1588-1591 of Title 18 (relating to peonage, slavery, involuntary servitude, and trafficking in persons);

(L) an offense described in—

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information),

2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of Title 18;

(ii) section 421 of Title 50 (relating to protecting the identity of undercover intelligence agents); or

(iii) section 421 of Title 50 (relating to protecting the identity of undercover agents);

(M) an offense that—

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii) is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

(N) an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter[;]

(O) an offense described in section 1325(a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of Title 18 or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which

the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15

years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.

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No. 05-1629

IN THE

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ALBERTO R. GONZALES, ATTORNEY GENERAL,
Petitioner,

v.

LUIS ALEXANDER DUENAS-ALVAREZ,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CALIFORNIA PUBLIC DEFENDERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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MOTION FOR LEAVE TO FILE BRIEF OF THE CALIFORNIA PUBLIC DEFENDERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT OUT OF TIME

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MOTION FOR LEAVE TO FILE BRIEF OF THE CALIFORNIA PUBLIC DEFENDERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT OUT OF TIME

The California Public Defenders Association respectfully requests that the brief of the California Public Defenders Association as *amicus curiae* in support of respondent be allowed to be filed out of time. The brief was time-stamped as filed at 3:40 p.m. on November 20, 2006, and the Court's order required all briefs to be filed by 3:00 p.m. on that same day. The brief was late due to coordination issues from California, where we are located and where the brief originated from. Although, we submitted our brief to the printer at 1:30 p.m., when it arrived they informed us they would not be able to deliver the brief in time for it to be filed by the 3:00 p.m. deadline. Regrettably, we were not aware of the 3:00 pm deadline until the printer alerted us of that issue. We very sincerely apologize for the delay and we respectfully request leave to file the brief out of time.

Respectfully submitted,

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Dated: November 21, 2006

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IN THE

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CALIFORNIA PUBLIC DEFENDERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

This brief is filed on behalf of the California Public Defenders Association as *amicus curiae* in support of respondent Luis Alexander Duenas-Alvarez, with the written consent of the parties.[1]

[1] As required by Rule 37.6 of this Court, *amicus curiae* submits that no party or counsel for a party to this case authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

INTEREST OF AMICUS CURIAE

With over 3,000 members, the California Public Defenders Association (CPDA) is the state's largest association of criminal defense attorneys. CPDA has been a national leader in continuing legal education for defense attorneys for over 26 years, and is only one of two organizations deemed by California to be an "automatically" approved legal education provider. Cal. Bus. & Prof. Code § 6070(b) (West 2000). CPDA attracts many private practitioners as associate members. CPDA's members are involved in both trial and appellate practice, and have knowledge and expertise in California criminal state law. Many of CPDA's clients are on parole or probation, or both. The California courts have granted CPDA leave to appear as *amicus curiae* in well over 30 California cases which culminated in published opinions. CPDA has also served as *amicus curiae* in the United States Supreme Court in cases involving criminal procedure issues. *See California v. Trombetta*, 467 U.S. 479 (1984); *Monge v. California,* 524 U.S. 721 (1998); *United States v. Knights,* 534 U.S. 112 (2001); *Lockyer v. Andrade,* 538 U.S. 63 (2003).

The California Public Defenders Association has substantial interest in the correct resolution of the question presented in this case, as this Court's decision will affect the rights of our clients and the practice of our members. We believe our brief can augment those presented by the parties and illuminate the history and nature of the California statute at the center of the current controversy. Thus, to assist the Court and to bring its attention to facts and analysis that have not already been presented by the parties, we respectfully submit this *amicus curiae* brief.

SUMMARY OF ARGUMENT

As its title makes clear, California Vehicle Code section 10851(a) prohibits the "Theft *and Unlawful Taking or Driving* of a Vehicle." Cal. Veh. Code § 10851(a) (West 2000) (emphasis added). The plain text of the statute indicates explicitly that, in clear contrast to other California statutes, section 10851(a) does not include an intent to steal as an element of the offense. Thus, since the enactment of its earliest precursors, the various formulations of section 10851(a) have all been interpreted to reach conduct that did not involve the intent to deprive another of property permanently.

Despite this long history and well-established California practice, petitioner's argument rests on the premise that section 10851(a) is a generic "theft offense" under the Immigration and Nationality Act, 8 U.S.C. 1101(a)(43)(G). From this starting point, petitioner claims that because one who aids and abets an offense has committed that offense, section 10851(a) is necessarily a "theft offense" under the categorical test set forth in *Taylor v. United States*, 495 U.S. 575 (1990). But petitioner's initial assumption is mistaken. California courts have long made clear that section 10851(a) and its predecessors cover conduct outside the core definition of "theft," including joyriding, post-theft driving, and participating as an accessory after the fact. As a result, whatever this Court should decide about the relationship of aiding and abetting liability to the underlying offense in connection with other statutes, section 10851 does not meet the generic definition of a "theft offense" under the *Taylor* standard.

An intent to steal lies at the core of any "generic" definition of "theft." Section 10851(a), on its face, permits convictions "without intent to steal." *See* Cal. Veh. Code § 10851(a). And the history of section 10851(a) illustrates that California courts and prosecutors have used the statute to convict defendants when there is no intent to steal. For ex-

ample, courts have applied the section to reach brief, temporary interferences with property, such as a defendant occupying a car briefly while rummaging through the glove compartment, *People v. Score*, 120 P.2d 62, 64 (Cal. Ct. App. 1941), or a defendant failing to return a car to a used car dealer four hours after it was due to be returned, *People v. Hutchings*, 51 Cal. Rptr. 415, 416 (Cal. Ct. App. 1966). Courts have also applied the statute to joyriding, an offense that does not require the intent to steal the vehicle, but only the intent to deprive its owner of possession temporarily. *People v. Allen*, 984 P.2d 486, 490 (Cal. 1999). Moreover, the statute has been used to cover post-theft driving; violations for unauthorized *driving* of a vehicle when the act of *taking* could not be proven. *People v. Garza*, 111 P.3d 310, 346 (Cal. 2005). California courts have also held that the act of *driving* is a separate and distinct act from *taking* under section 10851 and can be charged even when the act of taking can no longer be charged because the statute of limitations for the theft offense has run. *People v. Cuevas*, 63 P.2d 311, 313 (Cal. Ct. App. 1936).

Furthermore, section 10851(a) also imposes criminal sanctions on aiders and abettors. The government argues that aiders and abettors are included in the generic definition of "theft offense." Pet. Br. at 10. However, in California, aiders and abettors can be held liable for acts that are natural and probable consequences of the principal crime. *People v. Prettyman*, 926 P.2d 1013, 1019-20 (Cal. 1996). Given the breadth of aiding and abetting liability under California law, aiders and abettors can be found liable for a violation of section 10851(a), without knowledge or intent to commit a theft. As a result, section 10851(a) is broader than the generic definition of "theft offense."

Finally, section 10851(a) also imposes criminal sanctions on accessories. Accessories under California Penal Code section 32, are defined as "accessories after the fact" and do

not have the same requisite criminal intent as principals. *See People v. Mitten*, 112 Cal. Rptr. 713, 715 (Cal. Ct. App. 1974); Cal. Penal Code § 32 (West 1999).

Each of these reasons provides an independent basis for sustaining the Court of Appeals' conclusion that section 10851(a) is broader than a generic "theft offense."

ARGUMENT

I. THE STATUTORY BACKGROUND OF SECTION 10851 INDICATES THE STATUTE COVERS LESS SERIOUS CRIMES THAN THEFT

California law includes a variety of statutes that criminalize conduct that falls within the classic definition of theft and larceny. California's theft statute, Penal Code section 484, provides: "Every person who shall feloniously steal, take, carry, lead or drive away the personal property of another ... is guilty of theft." Cal. Penal Code § 484(a) (West 2000). California also has a grand theft statute, California Penal Code section 487(d), that criminalizes theft of an automobile, regardless of the value. It provides, "Grand theft is theft committed . . . when the property taken is an automobile." Cal. Penal Code § 487(d) (West 2000).

As its title suggests, and its operative language confirms, California Vehicle Code section 10851 covers some such conduct, but also extends far more broadly. Section 10851(a) provides:

> Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with *or without intent to steal* the vehicle, or any

> person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense and, upon conviction thereof, shall be punished by imprisonment in a county jail for not more than one year or in the state prison or by a fine of not more than five thousand dollars ($5,000), or by both the fine and imprisonment.

Cal. Veh. Code § 10851(a) (emphasis added).

As the italicized text makes clear, section 10851(a) diverges from typical theft statutes in that it does not require an intent to steal. California courts recognize this essential distinction between this statute and other "theft" statutes. In *People v. Orona,* 164 P.2d 769, 772 (Cal. Ct. App. 1946), the court contrasted section 503 - the precursor to section 10851(a) - with the statute criminalizing grand theft of automobiles (section 487(d)), noting that the former is a felony regardless of the intent to commit a theft. The California court stated:

> To constitute the offense prohibited by that section, it is not necessary to prove that it was the defendant's intention to steal the machine, or to permanently deprive the owner of his title thereto. The crime may be consummated when one takes and drives a vehicle, not his own, without the consent of the owner, 'with intent to . . . temporarily deprive the owner thereof of his . . . possession of such vehicle.'

Id. at 772 (quoting *People v. Zervas*, 142 P.2d 946 (Cal. Ct. App. 1943)).

Similarly, in *People v. Jeffries*, 119 P.2d. 190 (Cal. Ct. App. 1941), the court discussed the distinction between the statutes in deciding whether a defendant could be convicted

of grand theft if a jury did not find the defendant guilty of violating former section 10851. The court stated that the difference between the statutes is that grand theft requires a felonious taking of the property of another, whereas section 503 (the precursor to section 10851(a)) includes temporarily depriving the owner of possession of the vehicle, with or without the intent to steal the same. *Id.* at 194. The court concluded that section 503 was not a lesser included offense of grand theft because a defendant could violate section 503 without violating the grand theft statute. *Id.* In so holding, the *Jeffries* court stated, "Both in substance and in form the offenses charged are distinctly different." *Id.*

The placement of section 10851 in the Vehicle Code further suggests that the statute was intended to reach offenses that do not necessarily involve the criminal intent necessary for theft. Other statutes in the same chapter of the Vehicle Code address a range of offenses, many of which have nothing to do with theft. Like section 10851, some of these statutes themselves cover both theft and non-theft offenses within the same provision. For example, California Vehicle Code section 10855 addresses persons who lease or rent vehicles and fail to return them within five days after the time prescribed by the lease or rental agreement. *See* Cal. Veh. Code § 10855 (West 2000). Similarly, Vehicle Code section 10852 criminalizes the willful injuring or tampering with a vehicle, including the breaking or removing of any vehicle parts without the consent of the owner.[2] *See* Cal. Veh. Code § 10852 (West 2000). Likewise, Vehicle Code section 10853 criminalizes malicious mischief to a vehicle, such as setting an unattended vehicle in motion or manipulating the

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[2] Notably, section 10852 also covers both the theft and non-theft crimes. *See People v. Anderson*, 126 Cal. Rptr. 235, 239 (1975) (Legislature intended to expand statute to include tampering with vehicle, in addition to stealing or damaging car parts).

brakes. *See* Cal. Vehicle Code § 10853 (West 2000). While these statutes include criminal conduct, they tend to be wide-ranging, including vandalism, property crimes, and other non-theft offenses as well as theft. Section 10851 fits within this approach.

II. CALIFORNIA VEHICLE CODE SECTION 10851 APPLIES BROADLY AND COVERS CONDUCT OUTSIDE THE CORE DEFINITION OF THEFT

As explained in the Brief of *Amici Curiae* Professors of Criminal Law, any generic definition of a "theft offense" requires a level of criminal intent greater than intent to use property briefly and then return it. The statutory text and relevant California case law make clear that section 10851(a) applies to a range of conduct that falls below this level of criminal intent.

A. California Courts Have Construed Section 10851(a) and Its Precursors Broadly

California courts have held that section 10851(a) is broad enough to reach even a very brief deprivation of the vehicle from the owner. In *People v. Score*, 120 P.2d 62 (Cal. Ct. App. 1941), the defendant challenged his conviction for assault on the theory that his act of assault - striking a car owner who had grabbed him - had been self-defense. In upholding the assault charge, which depended on whether the defendant was committing a crime or just using self-defense, the court held that the defendant had violated an earlier (but materially identical) version of section 10851 because the owner found him sitting in the car, going through the glove compartment. *Id.* at 64. In doing so, the court noted that although there was no evidence that the defendant intended to steal the car, his conduct violated the statute because, "Tem-

porary possession may be for a day and it may be for less than a minute." *Id.*

Similarly, in *People v. Hutchings*, 51 Cal. Rptr. 415 (Cal. Ct. App. 1966), a defendant went to a used car dealer, expressed interest in purchasing a car, and asked permission to take if for 30 or 40 minutes to show it to his wife. The defendant was arrested for driving the same car while intoxicated, four hours later, 20 miles from the used car lot, and a substantial distance from his wife's home. *Id.* at 416. The defendant argued that he took the car with consent of the owner, and thus could not be guilty of a violation of section 10851. *Id.* The court held that even though there was not an "extended period of withholding" and the purpose for the use of the car was 'restricted", the defendant willfully drove the car "far beyond the scope of the original consent." *Id.* The court did not discuss whether the defendant intended to steal the car, but nevertheless affirmed his conviction for violating section 10851. *Id.*

The State's decision to proceed in *Hutchings* under section 10851(a), rather than under the theft statute (Penal Code section 484) or the grand theft statute for automobiles (Penal Code section 487(d)), indicates the breadth of the former statute and the limitation of the latter two. The case was viable only under section 10851 because, as noted above, that statute permits a conviction "with or without the intent to steal." Cal. Veh. Code § 10851(a). In contrast, under both sections 484 and 487(d), an intent to steal is an element of the offense. *People v. Matlock*, 51 Cal. Rptr. 2d 682 (Cal. Ct. App. 1959) (taking of property is not theft in the absence of intent to steal); *People v. Arriola*, 330 P.2d 683 (Cal. Ct. App. 1958) (to complete the crime of grand theft, intent to steal or take is necessary in addition to the actual stealing or taking).

B. Section 10851(a) Covers Joyriding

Until 1996, the principal statutory prohibition on "joyriding" resided in California Penal Code § 499b, which provided:

> Any person who shall, without the permission of the owner thereof, take any automobile, bicycle, motorcycle, or other vehicle or motorboat or vessel, for the purpose of temporarily using or operating the same, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not exceeding four hundred ($400) dollars, or by imprisonment not exceeding three months, or by both such fine and imprisonment.

Cal. Penal Code § 499b (1983) (amended 1996).

Courts and commentators regarded section 499b as largely duplicative of California Vehicle Code section 10851(a), and observed that the redundancy of these sections created confusion among jurors called to apply the statutes. *See People v. James,* 203 Cal. Rptr. 716, 721 (Cal. Ct. App. 1984) (Dalsimer, J., concurring) (noting that the difficulty in distinguishing between the offenses led to juror "confusion," which had "been apparent for decades"). In *People v. Ivans,* 4 Cal. Rptr. 2d 66 (Cal. Ct. App. 1992), the court suggested that,

> [t]he Legislature should revisit the auto theft statutes and consider repeal, amendment or enactment of corrective legislation of these confusing statutes. Conceivably, one auto theft statute would suffice to cover the crime in California.

Id. at 72 n.7.

Responding to these concerns, the California legislature

amended section 499(b) in 1996, removing the words "automobile, motorcycle or other vehicle." The legislative history makes clear that the purpose of this change was, "to clarify and streamline existing law by deleting provisions in Section 499b of the Penal Code that are generally duplicative of provisions in subdivision (a) of Section 10851 of the Vehicle Code." Cal. Stat. 1996, ch. 660, § 3 (quoting Assembly Bill No. 3170); *see also People v. Howard,* 66 Cal. Rptr. 2d 849, 851 (Cal. Ct. App. 1997) (discussing the legislative intent behind amending section 499b and also quoting Assembly Bill No. 3170). The legislators who amended section 499b noted that the "amendments to Section 499b of the Penal Code shall not be construed as evidencing a legislative intent to eliminate a crime." Cal. Stat. 1996, ch. 660, § 3.

Therefore, the Legislature's clear directive that joyriding is to be charged under section 10851(a) indicates that section 10851(a) covers conduct broader than the core definition of theft. As the California Supreme Court stated in *People v. Allen,* 984 P.2d 486 (Cal. 1999), "Vehicle code section 10851 can be violated either by taking a vehicle with the intent to steal it *or* by driving it with the intent to only to temporarily deprive its owner of possession (i.e., joyriding)." *Id.* at 490 (emphasis added).

C. California Courts Apply Section 10851(a) To Driving A Stolen Vehicle, Even When The Act Of Taking Cannot Be Proved Or Charged

California has long recognized section 10851(a) as a broad statute that can be used to convict a person of unlawfully *driving* a stolen vehicle, even when the act of *taking* cannot be proven for whatever reason. As the court stated in *People v. Frye,* 34 Cal. Rptr. 2d 180 (Cal. Ct. App. 1994), "There is no question that Vehicle Code section 10851 can be violated simply by the act of *driving* a car without the

owner's consent; the defendant need not have committed the original act of taking the car from the owner." *Id.* at 184-85 (citing *People v. Mamlamut*, 93 Cal. Rptr. 782, 784-85 (Cal. Ct. App. 1971)); *People v. Cuevas*, 63 P.2d 311 (Cal. Ct. App. 1936); *People v. Jaramillo*, 548 P.2d 706, 710 n.6 (Cal. 1976)).

In *People v. Jaramillo*, the California Supreme Court stated: "Vehicle Code section 10851 proscribes a wide range of conduct." 548 P.2d at 709. "[T]he statute recognize[s] that the section prohibits driving as separate and distinct from the act of taking." *Id.* at 710 n.6; *see also People v. Strong*, 35 Cal. Rptr. 2d 494, 497 (Cal. Ct. App. 1994); *People v. Cratty*, 91 Cal. Rptr. 2d 370, 373 (Cal. Ct. App. 1999); *People v. Garza*, 111 P.3d 310, 346 (Cal. 2005).

In *Strong*, the defendant was arrested while driving a stolen pickup truck. The court of appeal stated that the evidence at trial conclusively proved that the defendant had *driven* the pickup, but there was less substantial evidence that the defendant had *taken* the pickup. *Strong*, 35 Cal. Rptr. 2d at 497. Moreover, because four days had elapsed between the taking and the defendant's arrest while driving the vehicle, the taking and the driving were "two distinct" violations of section 10851. *Id.*

Likewise, in *People v. Cratty*, the defendant was convicted of violating section 10851 based on evidence that a California Highway Patrol officer had stopped and arrested the defendant as he was driving a car that had been stolen eight months earlier. The court of appeal reasoned that because it was undisputed that the defendant drove the car, "the jury must have at least found that defendant violated the (nontheft) 'driving' provision of section 10851(a)." *Cratty*, 91 Cal. Rptr. at 373.

Also, in *People v. Garza*, the defendant was found at a strip mall parking lot in the driver's seat of a car that had

been stolen six days earlier. The defendant offered no evidence suggesting any other person might have driven the car to that place. The court stated that, "The only reasonable inference that a juror could draw from the evidence at trial . . . was that defendant had driven the car there." *Garza,* 113 P.3d at 346. Consequently, the court held that, "The theft of the vehicle six days earlier was long since complete and the driving therefore constituted a separate, distinct, and complete violation of section 10851(a)." *Id.*

Even long after the statute of limitations has run for the crime of "taking," section 10851 can be used to charge the crime of "driving". In *People v. Cuevas*, a defendant was convicted of a violation of Section 503 (now Section 10851) four years after the vehicle was taken. 63 P.2d at 312. The defendant argued that the three-year statute of limitations barred his conviction. Evidence at trial showed the defendant had stolen the vehicle on March 29, 1932 and continually possessed it for four years. *Id.* at 153. The court affirmed the conviction, reasoning that though a conviction for the taking was time-barred, taking and driving were distinct crimes:

> . . . from a consideration of the definition of the crime of theft, as is set forth in section 484 of the Penal Code, it is clear that the offense of unlawfully driving an automobile (sec. 503, Vehicle Code) may be quite distinct from that of stealing one; consequently, that the assumed fact that on the date when the information was filed in the instant matter, the statute of limitations had run as against a case of theft, would not necessarily be determinative of the charge of unlawfully driving an automobile.

Id. In reaching its decision, the court emphasized the alternative language of section 503, which remains in Section

10851, that the statute operates against any person who "drives or takes a vehicle." *Id.* at 313. Because the taking and the driving are separate crimes and the theft had been fully completed, the court held that the act of driving the car, still without permission of the owner, was a separate crime of unlawful driving. The court stated that, "[w]ithout the consent of the owner of the automobile, each time that defendant so drove it was in violation of the provisions of the statute." *Id.*

Thus, by affirming convictions of driving a stolen vehicle, even when the act of taking could not have been proved or charged under section 10851(a), California courts have reinforced what the statutory language already makes clear -- that California Vehicle Code section 10851(a) broadly encompasses conduct other than theft.

III. SECTION 10851 ALSO COVERS AIDING AND ABETTING, WHICH IS INTERPRETED BROADLY UNDER CALIFORNIA LAW, FURTHER ILLUSTRATING THE STATUTE IS BROAD AND COVERS CONDUCT BESIDES THEFT

California Vehicle Code section 10851(a) can be violated if "a party or an accessory to or an accomplice" participates in the unauthorized taking or driving of a vehicle. Cal. Veh. Codes § 10851(a); *see also People v. Miles*, 77 Cal. Rptr. 89, 93 (Cal. Ct. App. 1969) (sustaining conviction under section 10851 of defendant that was passenger in stolen vehicle); *People v. Rinehart*, 290 P.2d 600, 601 (Cal. Ct. App. 1955) (upholding conviction of defendant as accomplice because he was found in driver's seat of stolen car and knew or should have known it was stolen). The inclusion of accomplices in section 10851 further suggests that the statute should not be interpreted as categorically a theft offense because "aiding and abetting liability in California 'is quite

broad.'" *Martinez-Perez v. Gonzalez*, 417 F. 3d 1022, 1027 (9th Cir. 2005) (citation omitted).[3]

In California, under the natural and probable consequences doctrine, an accomplice can be held liable for acts of which the accomplice was unaware, so long as those acts were "natural and probable consequences" of acts of which the accomplice *did* have knowledge. *See People v. Beltran*, 210 P.2d 238, 242 (Cal. Ct. App. 1949) (holding that "'persons who aid and abet in the commission of a criminal offense, though not being present, are liable for all the natural and probable consequences incident to the commission of the act which they have counseled or advised'" (citation omitted)); *People v. Beeman*, 674 P.2d 1318, 1326 (Cal. 1984) (liability of an aider and abettor extends also to natural and reasonable consequences of acts he knowingly and intentionally aids and encourages); *People v. Croy*, 221 Cal. Rptr. 592, 597 (Cal. Ct. App. 1985) (defendant whose liability is predicated on his status as an aider and abettor need not have intended to encourage or facilitate the particular offense ultimately committed by the perpetrator); *People v. Nguyen*, 26 Cal. Rptr. 2d 323, 333 (Cal. Ct. App. 1993) (holding that sexual offenses were reasonably foreseeable result of defendants' participation in robbery of tanning salon).

The California Supreme Court in *People v. Prettyman*, 926 P.2d 1013 (Cal. 1996), discussed at length the origin and scope of the natural and probable consequences doctrine in California:

> Under California law, a person who aids and abets a confederate in the commission of a criminal act is liable not only for that crime (the target crime),

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[3] The California statute concerning accomplices is section 31 of the California Penal Code. It states that "[a]ll persons ... [who] aid and abet in [the] commission [of a crime ... are principals in any crime so committed." Cal. Penal Code § 31 (West 1999).

> but also for any other offense (nontarget crime) committed by the confederate as a "natural and probable consequence" of the crime originally aided and abetted. To convict a defendant of a nontarget crime as an accomplice under the "natural and probable consequences" doctrine, the jury must find that, with knowledge of the perpetrator's unlawful purpose, and with the intent of committing, encouraging, or facilitating the commission of the target crime, the defendant aided, promoted, encouraged, or instigated the commission of the target crime. The jury must also find that the defendant's confederate committed an offense other than the target crime, and that the nontarget offense perpetrated by the confederate was a "natural and probable consequence" of the target crime that the defendant assisted or encouraged.

Id. at 1015. The court in *Prettyman* acknowledged that the "natural and probable consequences" doctrine has been "subjected to substantial criticism", but noted that nevertheless, it is an "established rule". *Id.* at 1019 (quoting Dressler, *Understanding Criminal Law* § 30.05, p. 427 (1987); *see also* 2 LaFave & Scott, *Substantive Criminal Law* § 6.8, p. 159 (1986)). In a concurring opinion in *People v. Luparello*, 231 Cal. Rptr. 832 (Cal. Ct. App. 1986), Judge Wiener criticized the natural and probable consequences rule, noting

> The major fallacy I see in the "foreseeable consequence" doctrine is not so much that it attributes an unintended act to the accomplice/co-conspirator but rather that it assesses the degree of his culpability for that act not by his own mental state but rather by the mental state of the perpetrator and/or the circumstances of the crime. . . . In our means-oriented society, to have the end alone justify the punishment is unconscionable.

Id. at 859-60 (J. Wiener, concurring).

People v. Nguyen, 26 Cal. Rptr. 2d 323, illustrates the potential breadth of the scope of the natural and probable consequences doctrine. In *Nguyen*, eight men robbed a tanning salon, threatened the owner with guns, and pinned her to the floor. *Id.* at 327. While pinned to the floor, one of the robbers used sexual assault as part of a threat to convince the owner to surrender her valuables. *Id.* These same individuals went on to rob a local spa, but this time, one of the robbers fondled and sexually violated the owner. *Id.* The perpetrators that did not commit the sexual acts were convicted of robbery and of aiding and abetting the sexual assaults. *Id.* at 326. On appeal, they argued that the forcible sexual acts were neither reasonably foreseeable nor the natural and probable consequence of robbery. *Id.* at 328-29. However, the court found ample evidence that the sexual offenses were a reasonably foreseeable result of the defendants' participation in the robbery, especially because they were charged with two different assaults. *Id.* at 332.

Therefore, as illustrated by these cases, because aiding and abetting liability is applied particularly broadly in California, a person who aided and abetted in the commission of a non-theft crime could end up being convicted for a section 10851(a) violation, even if they did not intend to commit "theft" under the statute.

IV. SECTION 10851 ALSO APPLIES TO ACCESSORIES AFTER THE FACT, WHOSE CONDUCT MAY NOT INVOLVE A THEFT OFFENSE

Section 10851 makes it a crime to be an "accessory" in the driving or unauthorized taking or stealing of a vehicle. Cal. Veh. Code § 10851. This aspect of the statute further indicates that it covers conduct beyond theft. Because "ac-

cessories" in California are only "accessories after the fact," and are not liable for the crime of the principal, their conduct plainly may fall outside the scope of a generic theft offense.

Under California law, an "Accessory" is defined under Penal Code section 32 as:

> Every person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony.

Cal. Penal Code § 32 (West 1999). Notably, the title of section 32 - "Accessories defined" - indicates that "accessories" are "accessories after the fact." This approach is consistent with California's elimination of the common law categories of "accessories before the fact" and "accessories after the fact." As noted in *People v. Mitten*, 112 Cal. Rptr. 713 (Cal. Ct. App. 1974):

> One who would have been an "accessory before the fact" is now a principal to the offense. . . . And, as we have stated, one who would formerly have been an "accessory after the fact" is now guilty as an accessory, a crime separate and distinct from the principal offense.

Id. at 715 (citations omitted).

The government argues that the word "accessory" in section 10851 does not necessarily have the same meaning as the term "accessory" in section 32. Pet. Br. 29. But, the government provides no convincing reason for treating the identical term differently. Nor does the government suggest an alternative meaning to the word "accessory" in section

10851. California courts hold there is a clear distinction between "accessories" and "aiders and abettors." *See Mitten*, 112 Cal. Rptr. at 715. As explained by the California Supreme Court in *People v. Horton*, 906 P.2d 478, 506 (Cal. 1995), "[a] mere accessory . . . is not liable to prosecution for the identical offense, and therefore is not an accomplice." *Id.* In *People v. Coffman*, 96 P.3d 30 (Cal. 2004), the Supreme Court further elaborated on the difference between an accomplice and an accessory noting, an accomplice "[i]s liable to prosecution for the identical offense charged against the defendant on trial," while an accessory is,

> defined as persons who, after a felony has been committed, harbor, conceal or aid a principal in the felony with the intent that the principal avoid criminal liability therefor and knowing that the principal has committed the felony or been charged with or convicted thereof.

Id. at 108; *see also United States v. Innie*, 7 F.3d 840, 852 (9th Cir. 1983) (noting the distinction of accessory after the fact from aiding and abetting, stating, "Unlike one who aids and abets a crime of violence, an accessory after the fact does not aid in the commission of the offense").

One can only conclude that that the word "accessory" appears in 10851, along with the word "accomplice," because the Legislature intended for it to cover conduct separate and distinct from aiding and abetting. Because section 10851 applies to accessories after the fact, it therefore applies to conduct without the requisite intent to commit a theft.

CONCLUSION

For all the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Dated: November 20, 2006

8746

FILED
NOV 20 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-1629

In the Supreme Court of the United States

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Petitioner,

v.

LUIS ALEXANDER DUENAS-ALVAREZ

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Amicus will address the following question:

Whether a conviction under a broadly worded criminal statute that reaches a wide array of relatively nonserious conduct qualifies categorically as a "theft offense" within the meaning of 8 U.S.C. § 1101(a)(43)(G).

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*

The National Immigration Project of the National Lawyers Guild (National Immigration Project) is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws.[1] Members of the National Immigration Project represent non-citizens before the Executive Office for Immigration Review, the Department of Homeland Security, and the federal courts, and in criminal matters in state and federal courts. The National Immigration Project provides legal training to the bar and the bench on the immigration consequences of criminal conduct and is the author of *Immigration Law and Crimes* and three other treatises published by Thomson-West. The National Immigration Project also has participated as *amicus curiae* in significant immigration-related cases before this Court, including, among others: *Fernandez-Vargas* v. *Gonzales*, 126 S. Ct. 2422 (2006); *United States* v. *Mendoza-Lopez*, 481 U.S. 828 (1987); and *Jean* v. *Nelson*, 472 U.S. 846 (1985). Because the National Immigration Project has substantial expertise in the issue presented here, it presents this brief to assist the Court in its consideration of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The government's position in this case is that "all

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

conduct" (U.S. Br. 3) that may be prosecuted under California Vehicle Code Section 10851(a) is a generic "theft offense" within the meaning of 8 U.S.C. § 1101(a)(43)(G). The government's highly technical argument does not have much to say about the practical consequences of its proposed rule. But the government's myopic focus on what it thinks is wrong with the court of appeals' holding in this case should not obscure either the extraordinary implications of the government's approach or its inconsistency with the more fundamental structure of federal immigration law.

In the statutory framework governing criminal offenses committed by non-citizens, Congress intended that aggravated felonies be the *most* serious crimes with the *most* serious consequences. The historical development and legislative history of federal immigration law reveal that Congress listed only what it regarded as the most serious offenses as aggravated felonies. This understanding is demonstrated both by Congress's choice of the statutory term "aggravated" and by its repeated reference to persons convicted of aggravated felonies as ones who are "especially dangerous" or who have committed "particularly serious" crimes.

The severe consequences that Congress attached to aggravated felony convictions confirm the common sense understanding that it intended to reserve the aggravated felony label for the most serious crimes. Non-citizens convicted of an aggravated felony are subject to automatic, expedited removal with almost no opportunity to challenge the proceedings. Judicial review is severely limited, and persons convicted of aggravated felonies are ineligible for cancellation of removal, voluntary departure, asylum, and withholding or deferral of removal. Such persons are put in mandatory detention, often immediately upon release from prison, and are permanently barred from becoming citizens. Finally, persons convicted of aggravated felonies who have been deported face up to twenty years in prison for illegal

reentry. In contrast, the penalties for non-citizens convicted of other offenses – such as "crimes involving moral turpitude," the original and most general provision dealing with criminal offenses committed by non-citizens – are not nearly as severe.

The California statute at issue here, California Vehicle Code section 10851(a), applies criminal sanctions to a broad range of conduct, some relatively innocuous (*e.g.*, rummaging through the glove compartment of someone else's car), a point demonstrated in detail by respondent. Furthermore, it is uncontested that section 10851(a) offenses do not qualify categorically as crimes involving moral turpitude, even though that is a catch-all category of offenses. It would be anomalous to hold that Congress nevertheless intended a violation of sectioin 10851(a) to trigger the most severe consequences; logic and common sense caution against such a jarring result. Because nothing about the vague term "theft offense" compels that conclusion, such a holding would undermine the congressional scheme, depart from this Court's longstanding rule that deportation statutes be construed narrowly in favor of non-citizens, cause considerable tension with the United States' treaty obligations, and run afoul of principles of lenity.

ARGUMENT

I. CONGRESS INTENDED AGGRAVATED FELONIES TO INCLUDE ONLY THE MOST SERIOUS OFFENSES.

A. The Text And History Of The Statutory Framework Governing Criminal Offenses Committed By Non-Citizens Demonstrate That Congress Intended Aggravated Felonies To Encompass Only The Worst Offenses.

The term "aggravated felony" is a relatively recent addition to federal immigration law. In 1891, Congress barred entry of "persons who have been convicted of a felony

or other infamous crime or misdemeanor involving moral turpitude." Act of March 3, 1891, ch. 551, § 1, 26 Stat. 1084, 1084. In 1917, it provided that a non-citizen would be subject to deportation if convicted within five years of entry of a "crime involving moral turpitude" carrying a sentence of a year or longer, or upon conviction of two separate crimes involving moral turpitude at any point after entry. Act of Feb. 5, 1917, ch. 29, § 19, 39 Stat. 874, 889 (1917).

The Immigration and Nationality Act (INA) of 1952, which (as amended) still provides the statutory framework for modern immigration law, incorporated these 1917 deportation provisions. See Ch. 477, § 241(4), 66 Stat. 163, 204. The current exclusion for crimes involving moral turpitude and current grounds for deportation are effectively unchanged from those of the 1917 Act. See 8 U.S.C. § 1182(a)(2)(A)(i); § 1227(a)(2)(A)(i)(2000); see also *INS* v. *St. Cyr*, 533 U.S. 289, 294 (2001).

Congress first used the term "aggravated felony" in the Anti-Drug Abuse Act of 1988 (ADAA), superimposing the aggravated felony category onto the pre-existing "crimes involving moral turpitude" provision to provide enhanced penalties for a limited number of dangerous crimes. Pub. L. No. 100-690, § 7341, 102 Stat. 4181. The ADAA defined an aggravated felony as "murder, any drug trafficking crime * * * or any illicit trafficking in any firearms or destructive devices * * * or any attempt or conspiracy to commit any such act." *Id.*, § 7342. The statute made conviction of an aggravated felony grounds for deportation, *id.*, § 7344, and introduced a new set of harsher consequences for those convicted of aggravated felonies. *Id.*, §§ 7343-7349. On the day the law was passed, Sen. D'Amato, a co-sponsor of the legislation, explained that the purpose of these new provisions was to create more effective sanctions for a "particularly dangerous class" of criminals. 134 Cong. Rec. S17301, S17317 (1988).

The Immigration Act of 1990 added money laundering and "crime[s] of violence" to the list of aggravated felonies, and also added language about state offenses to the definition. See Pub. L. No. 101-649, § 501(a), 104 Stat. 4978, 5048. The legislative background again showed that Congress focused on the seriousness of the aggravated felony offenses; Congress acted to "tighten existing laws regarding the categorization and deportation of aliens who commit serious crimes – crimes defined in the Anti-Drug Abuse Act of 1988 as 'aggravated felonies.'" 136 Cong. Rec. S17741-04 (1990) (statement of Sen. Graham).

For the same reason, Congress again added to the list of aggravated felonies in 1994 to include firearms offenses, ransom demands, child pornography, racketeering, prostitution, slavery, espionage, sabotage, treason, fraud, tax evasion, and alien smuggling. See Immigration and Nationality Technical Correction Act of 1994, Pub. L. No. 103-416, §222(a), 108 Stat. 4305, 4320-21. Congress also included for the first time the provision at issue here, "theft offense[s] * * * for which the term of imprisonment imposed * * * is at least 5 years." *Ibid.* Although Congress wanted to "do a better job of deporting criminal aliens," 140 Cong. Rec. H11291, H11293 (1994) (statement of Rep. McCollum), it added only what the sponsors described as "extremely serious crimes" to the list. *Ibid.* (statement of Rep. Mazzoli); see 140 Cong. Rec. S13707, S13731 (1994) (statement of Sen. Simpson) ("This bill would also expand the definition of "aggravated felony" so that aliens convicted of *serious crimes* can be swiftly deported." (emphasis added)).

One year later, in 1995, Congress again found that serious crimes had been left off the aggravated felony list, as it "noted with concern the development and increase of organized alien smuggling rings." H.R. Rep. 104-22, at *7. To deal with "[t]his new form of organized crime," Congress added offenses "often committed by persons involved in organized immigration crime" to the list of aggravated

felonies. *Ibid.*; see Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 440(e), 110 Stat. 1214, 1277-78; see also H.R. Rep. 104-22, at *14 (listing crimes added).

In adding these crimes to the list, Congress again intended to include only the most serious offenses. As the House Committee that drafted the bill explained in its report:

> In adding crimes to the list, effort was made to ensure that the overall reach of the definition would be consistent with the sentencing guidelines established by the United States Sentencing Commission. With only certain limited exceptions, the Committee attempted to ensure that all of the crimes defined as aggravated felonies carry a base offense level of at least 12. *These minimums have been selected to ensure that only the most serious crimes, or the more serious convictions of lesser crimes, render the alien deportable.*

H.R. Rep. 104-22, at *7-8 (emphasis added).[2]

In 1996, with its most recent major revision to the aggravated felony definition, Congress listed additional serious crimes, including rape and sexual abuse of a minor, as aggravated felonies. See Illegal Immigrant Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, Div. C, § 321(a), 110 Stat. 3009-546, at 3009-627 to 628; see also H.R. Rep. No. 104-828, at 223 (Conf. Rep.) (reporting the addition of new offenses "relating to gambling, bribery, perjury, revealing the identity of undercover agents,

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[2] Base level twelve and higher offenses are extremely serious. When AEDPA was drafted, they included, for example, murder, kidnapping, aggravated assault, and sexual abuse. See U.S. Sentencing Guidelines Manual §§ 2A1.1, 2A2.2, 2A3.1, 2A4.1 (1993).

and transporting prostitutes").[3] In its last additions, as in its first, Congress attempted to include only those offenses that warranted the most severe consequences.

Taken as a whole, the final list of aggravated felonies, 8 U.S.C. § 1101(a)(43), demonstrates a consistent congressional goal: Congress meant to include only offenses involving manifestly serious misconduct. Congress has been primarily concerned with offenses threatening serious harm to persons (murder, rape, sexual abuse of a minor, child pornography, weapons and explosives trafficking, crimes of violence, kidnapping, prostitution and human trafficking, organized crime, and drug trafficking (§ 1101(a)(43)(A), (B), (C), (E), (F), (H), (I), (J), (K), (M))); serious harm to property (money laundering, fraud, theft, counterfeiting, trafficking in stolen vehicles (§ 1101(a)(43)(D), (G), (M), (R))); serious threats to national security (espionage, treason, sabotage (§ 1101(a)(43)(L))); and harm to governmental interests (tax evasion, failure to appear in court or to serve sentence, perjury, and obstruction of justice (§ 1101(a)(43)(M), (Q), (S), (T))). Congress also has concluded that some immigration offenses warrant serious immigration-related consequences. See § 1101(a)(43)(N), (O), (P) (alien smuggling, illegal reentry of previously-deported aggravated felons, passport fraud). It is in this context that Congress included "theft offenses" as an aggravated felony.

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[3] IIRIRA also lowered the minimum term of imprisonment required for a number of crimes to be deemed aggravated felonies from five years to one year. See IIRIRA, § 321(a), 110 Stat. at 3009-627 to -628. In the Sentencing Guidelines in force at the time, a minimum sentence of one year corresponded to base offense levels of thirteen and above. See U.S. Sentencing Guidelines Manual § 5A (1993); cf. *supra* text accompanying note 2 (noting Congress's intent in AEDPA to limit aggravated felonies to offenses above base level twelve).

B. Congress's Use Of The Term "Aggravated" Also Signaled Its Intent To Reach Only Those Offenses Most Deserving Of Harsh Punishment.

Congress's choice of language confirms its focus on what it regarded as serious misconduct. It is well-established that "where Congress uses terms that have accumulated settled meaning under * * * the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 329 (1981); see also *Leocal v. Ashcroft*, 543 U.S. 1 (2004) ("[W]e construe language in its context and in light of the terms surrounding it."); *United States* v. *U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978) ("Congress will be presumed to have legislated against the background of our traditional legal concepts * * * ."). Although Congress first used the term "aggravated felony" in the immigration context, the word "aggravated" had a well-established prior meaning in federal and state law, identifying the most egregious offenses. A Congress that legislated against the background of that usage accordingly would have expected "aggravated felonies" to include only the most serious misconduct.[4]

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[4] In addition, while the point is not directly at issue here, surely another essential element of an "aggravated *felony*" is that it *is* a felony. "Common sense and standard English grammar dictate that when an adjective – such as 'aggravated' – modifies a noun – such as 'felony' – the combination of the terms delineates a subset of the noun." *United States* v. *Pacheco*, 225 F.3d 148, 157 (2d Cir. 2000) (Straub, J., dissenting). It strains logic and common sense, therefore, to suggest that the definition of an "aggravated felony" includes offenses that are not felonies, such as misdemeanors. Such a contorted definition does violence not only to the plain meaning of the statute, but also to congressional intent. Furthermore, the word "aggravated" signifies something "worse or more serious." *Id.* at 158. Therefore, "[t]o include misdemeanors within the definition of 'aggravated felony' turns the plain

In general parlance, the term "to aggravate" means "to increase the gravity of." *Oxford English Dictionary* 40 (1993). In the criminal context, "aggravated" describes a crime "made worse or more serious by circumstances such as violence, the presence of a deadly weapon, or the intent to commit another crime." *Black's Law Dictionary* 71 (8th ed. 2004). For instance, the Model Penal Code defines aggravated assault as "assault with an intent to cause serious bodily injury or with a deadly weapon," and it is classified as a felony in the second, rather than in the third, degree. Model Penal Code § 211.1 (2001). A survey of state criminal codes confirms that aggravated assault is "an assault that is more serious than a common assault." *Merriam-Webster Dictionary*, http://www.m-w.com/dictionary/aggravated-assault (last visited Nov. 19, 2006). In every state in which "aggravated assault" exists as a separate offense, it refers to more serious misconduct and carries harsher penalties than simple assault.[5] Similarly, the term "aggravated" refers to

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meaning of the word 'aggravated' entirely on its head, since in addition to not *being* felonies in the first place, misdemeanors are conventionally understood as being *less severe* than felonies, as well." *Id.* at 158. See also *United States* v. *Gonzales-Tamariz*, 310 F.3d 1168, 1172 (9th Cir. 2002) (Berzon, J., dissenting) (arguing that an aggravated felony must first be a felony, and that a felony has historically been a crime punishable by *more* than one year).

[5] Ariz. Rev. Stat. § 13-1204; Ark. Code Ann. § 5-13-204; Conn. Gen. Stat. § 53-11; D.C. Code § 22-404.01; Fla. Stat. § 784.021; Ga. Code Ann. § 16-5-21; Idaho Code Ann. § 18-905; 720 Ill. Comp. Stat. 5/12-2; Kan. Stat. Ann. § 21-3410; La. Rev. Stat. Ann. § 14:37; Me. Rev. Stat. tit. 17-A, § 208; Miss. Code Ann. § 97-3-7; Mont. Code Ann. § 45-5-202; N.M. Stat. Ann. § 30-3-2; N.D. Cent. Code § 12.1-17-02; Ohio Rev. Code Ann. § 2903.12; Okla. Stat. tit. 21, § 646; 18 Pa. Cons. Stat. § 2702; S.D. Codified Laws § 22-18-1.1; Tenn. Code Ann. § 39-13-102; Tex. Penal Code § 22.02; Utah Code Ann. § 39-6-101; Vt. Stat. Ann. tit. 13, § 1024; Wyo. Stat. Ann. § 6-2-502.

more serious forms of stalking,[6] kidnapping,[7] robbery,[8] rape,[9] and arson.[10]

In the federal context, the term "aggravated" also signifies a crime that is more serious or more violent than the underlying crime standing alone. For instance, aggravated sexual abuse, covered under 18 U.S.C. § 2241, is defined as sexual abuse "by force or threat" or sexual abuse of a minor, both of which are more serious crimes than sexual abuse without additional aggravating factors. Enacted before Congress used the term "aggravated felony" in the immigration context (see Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. No. 99-646, § 87(b), 100 Stat. 3620 (codified as amended at 18 U.S.C. § 2241)), § 2241 reflects Congress's familiarity with the use of the word "aggravated" to identify criminal conduct that causes especially serious injury.

Even ignoring this broader context, the statutory

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[6] See, *e.g.*, Ala. Code § 13A-6-91; Fla. Stat. § 784.048; Ga. Code Ann. § 16-5-91; 720 Ill. Comp. Stat. 5/12-7.4; Mich. Comp. Laws Serv. § 750.411i; Mo. Rev. Stat. § 565.225; Nev. Rev. Stat. Ann. § 200.575; N.M. Stat. Ann. § 30-3A-3.1; Tenn. Code Ann. § 39-17-315; Vt. Stat. Ann. tit. 13, § 1063.

[7] See, *e.g.*, 720 Ill. Comp. Stat. 5/10-2; Kan. Stat. Ann. § 21-3421; La. Rev. Stat. Ann. § 14:44; Mont. Code Ann. § 45-5-303; S.D. Codified Laws § 22-19-1; Tenn. Code Ann. § 39-13-304; Tex. Penal Code § 20.04; Utah Code Ann. § 76-5-302.

[8] See, *e.g.*, Ariz. Rev. Stat. § 13-1903; Colo. Rev. Stat. § 18-4-302; 720 Ill. Comp. Stat. 5/18-5; Kan. Stat. Ann. § 21-3427; Minn. Stat. § 609.245; Ohio Rev. Code Ann. § 2911.01; Tenn. Code Ann. § 39-13-402; Tex. Penal Code § 29.03; Utah Code Ann. § 76-6-302; Wyo. Stat. Ann. § 6-2-401.

[9] See, *e.g.*, La. Rev. Stat. § 14:42; Tenn. Code Ann. § 39-13-502.

[10] See, *e.g.*, Cal. Penal Code § 451.5; Idaho Code Ann. § 18-805; 720 Ill. Comp. Stat. 5/20-1.1; Kan. Stat. Ann. § 21-3719; La. Rev. Stat. § 14:51; N.J. Stat. Ann. § 2C:17-1; N.M. Stat. Ann. § 30-17-6; Ohio Rev. Code Ann. § 2909.02; Tenn. Code Ann. § 39-14-302; Utah Code Ann. § 39-6-99; Wyo. Stat. Ann. § 6-3-101.

framework of the Immigration and Nationality Act itself suggests that Congress intended use of the term "aggravated" to distinguish a set of more serious offenses. For instance, a non-citizen convicted of any controlled substance offense as defined in 21 U.S.C. § 802[11] is deportable. See 8 U.S.C. § 1227(a)(2)(B)(i). But a non-citizen convicted of "*illicit trafficking* in a controlled substance (as defined in section 802 of Title 21) [the same statute]" is an aggravated felon. 8 U.S.C. § 1101(a)(43)(B) (emphasis added). Congress's fine distinction between aggravated ("illicit trafficking") and non-aggravated (everything else) drug offenses – a distinction repeated as to firearms offenses[12] and passport fraud[13] – reflects the congressional intention to select only the most serious crimes for inclusion as aggravated felonies.

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[11] There is one exception: conviction under § 802 for a single offense involving possession for one's own use of 30 grams or less of marijuana is not grounds for deportation. See 8 U.S.C. § 1227(a)(2)(B)(i).

[12] Conviction "under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of title 18, United States Code)" makes a non-citizen deportable. 8 U.S.C. § 1227(a)(2)(C). Only "*illicit trafficking* in firearms or destructive devices (as defined in section 921 of Title 18) [the same statute]," by contrast, is an aggravated felony. See 8 U.S.C. § 1101(43)(C) (emphasis added).

[13] Any non-citizen convicted of passport fraud under 18 U.S.C. § 1546 is deportable. 8 U.S.C. § 1227(a)(3)(B)(iii). But a violation of 18 U.S.C. § 1546 is an aggravated felony only if the sentence is a year or more. 8 U.S.C. § 1101(a)(43)(P).

II. THAT AGGRAVATED FELONIES CARRY THE HARSHEST SANCTIONS FOR NON-CITIZENS CONFIRMS CONGRESS'S INTENT ~~TO~~ TREAT ONLY THE MOST SERIOUS OFFENSES AS AGGRAVATED FELONIES.

Because Congress considers aggravated felonies "the most serious offenses" covered by the INA, H.R. Rep. No. 109-345(I), at 69 (2005), it has reserved the most severe consequences for these offenses. Conviction of an aggravated felony subjects non-citizens to serious and permanent penalties, including mandatory detention and deportation, ineligibility for most forms of discretionary relief and asylum, and permanent bars to reentry and naturalization. Conviction of a crime that is not an aggravated felony, on the other hand, carries far less severe consequences. To illustrate the severity of the penalties associated with the aggravated felony label, we next compare the sanctions for conviction of an aggravated felony with those for conviction of a crime involving moral turpitude, the largest, catch-all category of offenses under the immigration laws. As we note below, there also are other types of criminal offenses that trigger adverse immigration consequences; in every case, the penalties for aggravated felonies are the most severe.[14] This reality is powerful evidence that Congress intended aggravated felonies to encompass only the most serious types of misconduct.

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[14] In addition to aggravated felonies and crimes involving moral turpitude, categories of crimes with immigration consequences include controlled substance offenses, 8 U.S.C. § 1182(a)(2)(B); firearms offenses, 8 U.S.C. § 1182(a)(2)(C); money laundering, 8 U.S.C. § 1182(a)(2)(I); crimes of domestic violence, 8 U.S.C. § 1227(a)(2)(E); alien smuggling, 8 U.S.C. § 1227(a)(1)(E); visa and passport fraud, 8 U.S.C. § 1227(a)(3)(B)(iii); and export law violations, 8 U.S.C. § 1227(a)(4)(C).

A. Removal

1. Aggravated Felonies

The INA provides that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii). There is no requirement that the crime be committed within a certain number of years from the date of admission. In fact, non-citizens are often detained and placed in removal proceedings five, ten, or even twenty years after conviction of an aggravated felony. See, *e.g.*, *Kuhali* v. *Reno*, 266 F.3d 93 (2d Cir. 2001) (finding a non-citizen deportable for a conviction twenty years prior to removal order). Nor does it matter how long an individual has resided in the United States. See, *e.g.*, *Ayala-Chavez* v. *INS*, 944 F.2d 638, 640 (9th Cir. 2001) (finding an 18-year resident deportable even though most of his family resided near him and he had a minor daughter whom he supported); *Zaluski* v. *INS*, 37 F.3d 72, 72 (2d Cir. 1994) (finding a 30-year resident who spoke only English and had no family in home country deportable). Finally, it takes only one aggravated felony conviction to trigger deportation. 8 U.S.C. § 1227(a)(2)(A)(iii).

2. Crimes Involving Moral Turpitude

Conviction of a crime involving moral turpitude is grounds for deportation only if the offense is punishable by one year or more and is committed within five years of admission. 8 U.S.C. § 1227(a)(2)(A)(i). After five years, only multiple moral turpitude convictions can trigger deportation. 8 U.S.C. § 1227(a)(2)(A)(i). In contrast, only certain aggravated felonies must carry a minimum sentence to trigger deportation. See, *e.g.*, 8 U.S.C. § 1101(43)(D) (requiring only that money laundering offenses involve at least $10,000 to be aggravated felonies).

B. Cancellation Of Removal

1. Aggravated Felonies

A non-citizen who is removable because of an

aggravated felony conviction may not petition for discretionary cancellation of removal. Lawful permanent residents may generally petition for cancellation of removal so long as they have resided in the United States for at least seven years and have been lawful permanent residents for at least five years. 8 U.S.C. § 1229b(a). Non-lawful permanent residents seeking cancellation of removal face a somewhat more difficult road; among other requirements, these non-citizens must demonstrate "good moral character" and that removal would mean "exceptional and extremely unusual" hardship to family members. 8 U.S.C. § 1229b(b)(i). But an aggravated felony conviction automatically ends the non-citizen's chances: lawful permanent residents and non-lawful permanent residents alike are barred from seeking cancellation of removal if they have been convicted of an aggravated felony. 8 U.S.C. § 1229b(a) ("The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien * * * has not been convicted of any aggravated felony."); 8 U.S.C. § 1229b(b) (allowing discretionary cancellation of removal for a non-legal permanent resident, but specifically excluding individuals convicted of aggravated felonies). Non-citizens convicted of aggravated felonies, unlike other non-citizens, are not eligible for waiver of deportation even if they are victims of domestic violence. 8 U.S.C. § 1229b(b)(2).

2. Crimes Involving Moral Turpitude

Lawful permanent residents are eligible for cancellation of removal if convicted of a crime involving moral turpitude, so long as they meet additional residency requirements. 8 U.S.C. § 1229b(a)(1)-(2).

C. Voluntary Departure

1. Aggravated Felonies

Voluntary departure is another form of discretionary relief for which a non-citizen with an aggravated felony

conviction is ineligible. It allows otherwise removable individuals to leave the country at their own expense within a designated amount of time to avoid a final order of removal. There are two types of voluntary departure: pre-hearing under 8 U.S.C. § 1229c(a)(1) and at the conclusion of the hearing under 8 U.S.C. § 1229c(b)(1). Both forms of voluntary departure are important forms of relief that allow non-citizens to "avoid[] the stigma of compulsory removal, permit[] the alien to select his or her own destination, and facilitate[] the possibility of return to the United States." *Rife v. Ashcroft*, 374 F.3d 606, 614 (8th Cir. 2004); see also *Dekoladenu v. Gonzales*, 459 F.3d 500, 506 (4th Cir. 2006). Pre-hearing voluntary departure is available for non-citizens who do not wish to undergo official deportation proceedings, and is available *unless* the non-citizen has been convicted of an aggravated felony or has engaged in terrorist activities. 8. U.S.C. § 1229c(a)(1). To be eligible for voluntary departure at the conclusion of the hearing, the non-citizen must show that he or she was "present in the United States" for "at least one year" before the "notice to appear was served" and a person of "good moral character" for at least the past five years. § 1229c(b)(1). As with pre-hearing voluntary departure, an aggravated felony conviction automatically makes a non-citizen ineligible.

2. Crimes Involving Moral Turpitude

Non-citizens convicted of crimes that have been placed in less serious categories by Congress (including crimes involving moral turpitude) may obtain pre-hearing voluntary departure, since that form of voluntary departure does not include a "good moral character" bar. A non-citizen with a conviction for a crime involving moral turpitude may be eligible for voluntary departure at the conclusion of the hearing if she or he can establish good moral character for the requisite period and satisfy the other statutory requirements. 8 U.S.C. § 1229c(b)(1).

D. Asylum And Withholding Of Removal

Asylum is a form of relief available to a non-citizen who fears persecution in his or her country of origin on account of "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1158(b)(1)(B)(i). An alternative to asylum, withholding of removal, is available to some otherwise-deportable non-citizens whose "life or freedom" would be threatened on account of the same five factors. 8 U.S.C. § 1231(b)(3)(A). Unlike asylum, withholding of removal may not lead to permanent residence or naturalization, but usually serves as the last resort for removable individuals who would face extreme forms of persecution, torture, or even death if they return to their home country. Similarly, deferral of removal is available for non-citizens who would be subjected to torture for any reason if they were forced to return home. See 8 C.F.R. § 208.16(c)(2) (2006). Withholding of removal under 8 U.S.C. § 1231(b)(3)(A) and deferral of removal under 8 C.F.R. § 208.16(c)(2) fulfill the United States' legal obligations under the 1951 Refugee Convention[15] and the 1984 Convention Against Torture,[16] respectively. Moreover, asylum is an important humanitarian protection.

1. Aggravated Felonies

A non-citizen convicted of an aggravated felony, however, is permanently barred from seeking asylum. 8 U.S.C. § 1158(b)(2)(B)(i); 8 U.S.C. § 1231(b)(3)(B). Under the Immigration and Nationality Act, an alien is ineligible for asylum if "convicted by a final judgment of a particularly serious crime," 8 U.S.C. § 1158(b)(2)(A)(ii); INA §

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[15] Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter "Refugee Convention"].

[16] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85, G.A. Res. A/39/46, U.N. Doc. A/39/51 (Dec. 10 1984).

208(b)(2)(A)(ii). Aggravated felonies count as particularly serious crimes. See *id*, § 1158 (b)(2)(B)(i).

Additionally, a non-citizen convicted of an aggravated felony is presumptively ineligible for withholding of removal. See, *e.g.*, *In re Y-L-*, 23 I&N Dec. 270, 273 (AB.I.A. 2002) (noting presumption for drug trafficking aggravated felonies). If the non-citizen is "convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years," the bar becomes inescapable. See 8 U.S.C. § 1231(b)(3)(B); Non-citizens convicted of aggravated felonies and sentenced to less than five years' imprisonment also may be subject to discretionary denial of withholding of removal. *Ibid.*; see also *Tunis* v. *Gonzales*, 447 F.3d 547, 549 (7th Cir. 2006). Non-citizens convicted of aggravated felonies likewise may not petition for deferral of removal under the Convention Against Torture if the aggregate term of imprisonment is at least five years. 8 C.F.R. § 208.16(d)(2) (2006).[17]

2. Crimes Involving Moral Turpitude

Non-citizens convicted of a crime involving moral turpitude, on the other hand, are eligible for asylum and are not automatically barred from withholding of removal. 8 U.S.C. §§ 1158(b)(2)(A), 1231(b)(3)(B).

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[17] Non-citizens convicted of particularly serious crimes within the meaning of the statute may still apply for deferral of removal. 8 C.F.R. § 208.17(a), (b)(i)-(iv). Deferral of removal, however, may not lead to residency or citizenship, may be revoked at any point, and does not require a release from detention. In fact, non-citizens are often detained until another country agrees to accept them or until conditions in their home country change. Deferral of removal also does not protect refugees who fear persecution that does not rise to the level of torture under U.S. law.

E. Mandatory Detention

1. Aggravated Felonies

Under 8 U.S.C. § 1226(c)(1), individuals in removal proceedings because of an aggravated felony conviction are subject to mandatory detention. Unless the non-citizen is a witness in an ongoing criminal investigation or prosecution, release for any reason is prohibited. 8 U.S.C. § 1226(c)(2). Aggravated felons are generally released from incarceration directly into Department of Homeland Security (DHS) custody. If the non-citizen eludes DHS at the time of release, however, or if the non-citizen serves no time for the offense, detention is still required. See *In re Rojas*, 23 I & N Dec. 117 (B.I.A. 2001).

2. Crimes Involving Moral Turpitude

Non-citizens convicted of one crime of moral turpitude, on the other hand, are subject to mandatory detention only if they were actually sentenced to one year or more in prison. 8 U.S.C. § 1226(c)(1)(C).

F. Expedited Removal

1. Aggravated Felonies

Non-lawful permanent residents convicted of aggravated felonies are subject to expedited removal, in which individuals have no right to a hearing in front of an immigration judge. 8 U.S.C. § 1228(a). Instead, a service officer makes a determination as to whether the individual has been convicted of an aggravated felony and is therefore deportable. 8 C.F.R § 1238.1(b) (2006). This procedural shortcut makes a significant difference: the non-citizen may not appear in person and therefore may challenge the charges only in writing. If the deciding officer finds that "deportability is established by clear, convincing, and unequivocal evidence in the record of proceeding," a final removal order is issued without formal removal proceedings. *Id*, § 1238.1(d)(2). There is a presumption of deportability for any non-citizen convicted of a crime that is determined to be

an aggravated felony. 8 U.S.C. § 1228(c). There is no appeal to the Board of Immigration Appeals of a final removal order for non-citizens subject to expedited removal. 8 C.F.R. § 1238.1(g)(2); *United States* v. *Santiago-Ochoa*, 447 F.3d 1015, 1019 (7th Cir. 2006). Because of these limitations, for a non-citizen placed in expedited proceedings, removal is a "foregone conclusion" as a practical matter. *United States v. Garcia-Martinez*, 228 F.3d 956, 963 (9th Cir. 2000); see also *United States v. Benitez-Villafuerte*, 186 F.3d 651 (5th Cir. 1999).

Furthermore, Congress has stated its preference that the enforcement agency place non-citizens with an aggravated felony conviction in removal proceedings before completing their sentences. 8 U.S.C. § 1228(a)(3)(A). In 2004, 25,633 non-citizens convicted of criminal offenses were removed under the Institutional Removal Program, which is designed to identify non-citizens while still incarcerated. See Department of Homeland Security, *Immigration Enforcement Actions: 2004*, *in* 2004 Yearbook of Immigration Statistics (2005). A non-citizen with a removal order still must serve his or her sentence before the Department of Homeland Security will execute the removal order. 8 U.S.C. § 1228(a)(3)(B). Unless it is not foreseeable that the government will be able to execute a removal order, a non-citizen will be detained until the government can execute the order. 8 U.S.C. § 1231(a)(2); *Zadvydas* v. *Davis*, 533 U.S. 678, 683 (2001).

2. Crimes Involving Moral Turpitude

Non-citizens convicted of a single crime involving moral turpitude are not subject to expedited removal provisions. 8 U.S.C. § 1228(a)(1). They receive procedural protection and an independent adjudication before the Executive Office for Immigration Review.

G. Unlawfully Entering The United States

1. Aggravated Felonies

Under 8 U.S.C. § 1326, non-citizens who unlawfully enter or re-enter the United States are subject to an array of penalties. All illegal entrants are subject to fines and prison terms. As with deportation and admissibility consequences, the most serious penalties for illegal entrants are reserved for non-citizens who were previously convicted of an aggravated felony. See 8 U.S.C. § 1327(b)(2). Courts have recognized the hierarchy of penalties:

> The clear purpose of § 1326 is to deter aliens who have been forced to leave the United States from reentering the United States without prior consent of the Attorney General, and to provide for varied maximum terms of imprisonment for undeterred aliens *depending on the convictions prior to deportation*. An alien who committed a felony may be imprisoned for a longer term on illegally [sic] reentry than an alien who has not committed a felony, and an alien who has committed an aggravated felony may be imprisoned for a longer term than one who has committed a non-aggravated felony.

United States v. *Cooke*, 850 F. Supp. 302, 306 (E.D. Penn. 1994) (emphasis added). Non-citizens convicted of aggravated felonies who attempt to re-enter the United States are subject to a fine, imprisonment for up to twenty years, or both. 8 U.S.C. § 1326(b)(2).[18]

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[18] The Federal Sentencing Guidelines suggest more serious penalties upon reentering for non-citizens previously deported for certain aggravated felonies: "a drug trafficking offense for which the sentence imposed exceeded 13 months; a crime of violence; a firearms offense; a child pornography offense; a national security or terrorism offense; a human trafficking offense; or an alien smuggling offense." U.S. Sentencing Guidelines Manual §

This Court has held, for purposes of § 1326, that a prior conviction for an aggravated felony is a sentence enhancement. See *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998). Section 1326(a) establishes a substantive offense of illegally entering or attempting to enter the United States; that offense is punishable by a fine and up to two years in prison. Under *Almendarez-Torres*, courts treat aggravated felony offenders as recidivists, a finding that increases the maximum penalty to twenty years in prison. *Id.* at 226. A tenfold increase in the maximum prison term thus results from a prior aggravated felony conviction.

In addition, anyone who aids or assists an aggravated felon in unlawfully reentering the United States faces a fine and/or up to ten years in prison. 8 U.S.C. § 1327. At least two courts of appeals have held that knowledge of the non-citizen's prior conviction is not required for conviction; the aider need only know that the non-citizen is inadmissible. See *United States* v. *Flores-Garcia*, 198 F.3d 1119 (9th Cir. 2000) (holding that an aider's lack of knowledge of an alien's prior narcotics convictions was not required); *United States* v. *Figueroa*, 165 F.3d 111 (2d Cir. 1998) (holding that an aider's lack of knowledge of an alien's prior kidnapping conviction was not required).

Aiders of entering non-citizens convicted of an

2L1.2(b)(1)(A) (2005). Assuming no prior criminal history and no other aggravating factors, the Guidelines recommend up to sixty-three months in prison for those offenders. *Id.*, §§ 2L1.2(b)(1)(A), 5A. Keeping the same assumptions, non-citizens previously deported for one of the other aggravated felonies face a recommended maximum of up to twenty-seven months in prison upon re-entry. *Id.*, §§ 2L1.2(b)(1)(C), 5A. At the bottom of the Sentencing Guidelines' hierarchy are persons with previous convictions for non-aggravated felonies or three or more violent or drug-related misdemeanors, who face a recommendation of up to sixteen months in prison upon re-entry. *Id.*, §§ 2L1.2(b)(1)(D), 5A.

aggravated felony face the same statutory maximum penalty as those who aid terrorists in entering the United States. See 8 U.S.C. §§ 1182(a)(3)(B), 1327.

2. Other Offenses

Placed a notch below those convicted of aggravated felonies in Congress's hierarchy of illegal reentrants are non-citizens who have committed "three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony)." 8 U.S.C. § 1326(b)(1). These illegal re-entrants face a statutory maximum of ten years in prison. The lowest level of penalties is reserved for those who re-enter the United States without a misdemeanor, felony, or aggravated felony conviction. Those non-citizens face a statutory maximum of two years' imprisonment. 8 U.S.C. 1326(a)(2).

H. Naturalization

1. Aggravated Felonies

Under 8 U.S.C. § 1427(a), an individual who wishes to naturalize must have good moral character. But the INA states that "[n]o person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was * * *one who at any time has been convicted of an aggravated felony." 8 U.S.C. § 1101(f). An aggravated felony committed after November 29, 1990 is thus an automatic and permanent barrier to naturalization.

2. Crimes Involving Moral Turpitude

Non-citizens convicted of a crime involving moral turpitude are not automatically considered to lack good moral character. The statute establishes a non-exhaustive list of acts that constitute a bar to good moral character. Commission of a crime involving moral turpitude is not on the list. 8 U.S.C. § 1101(f). To be sure, many of § 1101(f)'s enumerated acts are also crimes involving moral turpitude, and the statute does not "preclude a finding that for other reasons such

person is or was not of good moral character." *Ibid.* Nevertheless, although conviction of some offenses that are also crimes involving moral turpitude will result in denial of naturalization, the bare fact of conviction of a crime of moral turpitude will not. Disqualification is thus not automatic for crimes of moral turpitude the way it is for aggravated felonies.

III. BECAUSE IT IS DOUBTFUL THAT CONGRESS INTENDED ALL OF THE CONDUCT MADE CRIMINAL BY CAL. VEH. CODE § 10851 TO BE TREATED AS AN AGGRAVATED FELONY, § 10851 CONVICTIONS SHOULD NOT CATEGORICALLY BE DEEMED "THEFT OFFENSES."

The aggravated felony regime contains the harshest immigration sanctions in our Nation's history. Recognizing this, Congress explicitly has tried to cabin the definition of aggravated felonies to the most serious offenses. Given the congressional scheme, if an offense makes criminal a wide array of conduct, some of it relatively innocuous, courts should categorize it as an aggravated felony only if the congressional intent to so treat it is unambiguous.

This logical, common sense conclusion draws support from the Court's settled doctrine, based on the rule of lenity, that deportation statutes should be construed narrowly and in favor of non-citizens because of the gravity of the consequences. See *Leocal v. Ashcroft*, 543 U.S. 1 (2004). Furthermore, courts should not construe a statute in a manner that would put the United States in violation of its international treaty obligations unless the law's language unambiguously compels that result, see *Murray* v. *The Charming Betsy*, 6 U.S. 64, 118 (1804); courts accordingly should not label particular offenses aggravated felonies if doing so would contravene the United States' obligations under the 1951 Refugee Convention unless Congress's

contrary intent is absolutely clear.

Applying these principles here, violations of California Vehicle Code section 10851 should not be treated as categorical theft offenses.

1. This Court recently reaffirmed "'the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.'" *INS* v. *St. Cyr*, 533 U.S. 289, 320 (2001) (quoting *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (collecting cases)). This approach is an extension of the rule of lenity from the criminal to the deportation context. Speaking for the Court, Justice Frankfurter explained why the lenity principle is so entrenched in criminal law:

> When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or anti-social conduct. It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment.

Bell v. *United States*, 349 U.S. 81, 83 (1955).

It did not take the Court long after Congress made crimes involving moral turpitude grounds for deportation in 1917 to recognize that deportation can carry consequences every bit as severe as those imposed by criminal penalties. See *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922) (Brandeis, J.) ("[Deportation] may result also in loss of both property and life, or of all that makes life worth living."). As a consequence, the Court extended the rule of lenity to deportation: "Although not penal in character, deportation statutes as a practical matter may inflict 'the equivalent of banishment or exile' * * * and should be strictly construed." *Barber* v. *Gonzales*, 347 U.S. 637, 642-43 (1954) (internal

citations omitted); see also *INS* v. *Errico*, 385 U.S. 214, 225 (1966) ("'To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used'" (quoting *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1948)).). Given the extraordinary penalties Congress has attached to a conviction for an aggravated felony, the rule of lenity applies with special force in this context. Cf. *Leocal*, 543 U.S. at 11 n.8. (holding that since the rule of lenity applies to criminal statutes, it must also apply in deportation proceedings triggered by criminal convictions).

2. In the legal setting here, the United States' international legal obligations also require courts to ensure that aggravated felonies include only serious offenses. It is well-established that courts should not construe a statute in a manner that would put the United States in violation of its treaty obligations unless the law's language unambiguously compels that result. See, *e.g.*, *The Charming Betsy*, 6 U.S. at 118; *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982). To the extent that a statute is open to multiple interpretations, courts should pick the one most consistent with the United States' treaty obligations.

The United States is a party to the 1951 Refugee Convention, which prohibits signatories from returning refugees to countries where their life or freedom are threatened ("non-refoulement"). *Refugee Convention*, *supra* note 15, art. 33(1). This Court has recognized that withholding of removal is the domestic implementation of the United States' obligations under article thirty-three. *Cardoza-Fonseca*, 480 U.S. at 429; *INS* v. *Stevic*, 467 U.S. 407, 421 (1984). The Refugee Convention contains an exception to non-refoulement for individuals convicted "of a particularly serious crime." *Refugee Convention*, art. 33(2).

Congress intended to comply with its obligations under the Refugee Convention by ensuring that convictions for non-serious offenses not result in refoulement. Congress used language identical to article 33(2) in its restrictions on withholding of removal, denying withholding to non-citizens convicted of a "particularly serious crime." 8 U.S.C. § 1231(b)(3)(B). The Immigration Act of 1990 originally defined a "particularly serious crime" as any aggravated felony. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5053 (1990). Congress later amended this definition to include only an offense or offenses carrying an aggregate sentence of five years or more. See IIRIRA, § 305(a)(3), 110 Stat. 3009-546, at 3009-602 (currently codified at 8 U.S.C. § 1231(b)(3)(B)). The Board of Immigration Appeals has recognized that Congress made this change out of a particular concern to fulfill the United States' international obligations under the Refugee Convention. See *In Re Q-T-M-T-*, 21 I. & N. Dec. 639, 648 & n.4 (1996) (surveying the applicable legislative history and noting that Congress found the change "necessary to ensure that the refoulement of a particular criminal alien would not place our compliance with the [Refugee Convention] in jeopardy"). Although Congress has always intended to exclude all non-serious offenses from the definition of "aggravated felony," see *supra* Part I, it felt the need for extra caution in the non-refoulement context.

Because the five-year requirement applies to aggregate sentences, however, there are situations in which this extra caution will come to naught if conduct that is not serious may be deemed an aggravated felony. For instance, a non-citizen convicted of five theft offenses for shoplifting with a one-year suspended sentence for each offense would be barred from withholding of removal. Likewise, a suspended five-year sentence would bar a non-citizen from withholding of removal, even if no time were actually served. To avoid this problem, and thus to ensure that the United States acts in

accordance with its treaty obligations, the Court should take care to ensure that all convictions held to be "aggravated felonies" are for serious offenses.

3. Section 10851(a) punishes a broad range of conduct, much of which is far less serious than most aggravated felonies.[19] Violations of section 10851(a) are "wobblers," so-called because they may be charged as either felonies or misdemeanors. See, *e.g.*, *In re Nancy C.*, 34 Cal. Rptr. 3d 871 (Cal. Ct. App. 2005) (juvenile charged with section 10851(a) wobbler); see also *People* v. *Statum*, 28 Cal. 4th 682 (2002) (reviewing scope of sentencing court's discretion when confronted with wobbler offense). Defendants have been convicted under this section for offenses such as sitting in someone else's car, rummaging through the glove compartment. See *People* v. *Score*, 120 P.2d 52 (Cal. Ct. App. 1941). Respondent further demonstrates the ways in which section 10851 sweeps with an especially broad brush.

There is no indication that Congress meant to include such relatively innocuous conduct in the definition of an aggravated felony theft offense. Quite the contrary: as we have shown, Congress intended to define only the most serious offenses as aggravated felonies. This background militates powerfully against the conclusion that Congress intended the general term "theft offense" categorically to include all conduct reached by California Vehicle Code section 10851.

Adding further support to this conclusion, the immigration judge in this case held that section 10851(a)

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[19] It provides: "Any person who drives or takes a vehicle not his or her own * * * with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle * * * or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing * * * shall be punished by imprisonment * * * or by a fine * * * or by both." Cal. Veh. Code § 10851(a).

offenses are not even categorical crimes involving moral turpitude. Pet. App. 8a-9a. The government did not challenge that ruling in the court below. And for good reason: courts have held for decades that only thefts involving *permanent* deprivations of property qualify as crimes involving moral turpitude. See, *e.g.*, *Bakal* v. *Ashcroft*, 56 Fed. Appx. 650, 654 (2003) (citing *In re Matter of Grazley*, 14 I. & N. Dec 330, 332 (B.I.A. 1973)). Convictions under a statute that covers temporary deprivations, then, like the one at issue here, cannot categorically be crimes involving moral turpitude.[20] Indeed, the BIA has held that the predecessor to California Vehicle Code section 10851(a) was not a crime involving moral turpitude, precisely because it covered temporary deprivations. See *In re V-Z-S*, 22 I. & N. Dec. 1338, 1350 n.12 (B.I.A. 2000) (referring to *In re D-*, 1 I&N Dec. 143 (B.I.A. 1941).

The hierarchy of offenses laid out above, as well as the evolution and legislative history of the statute, illustrate that Congress intended aggravated felonies to be the most serious ground of deportability. Because section 10851 offenses are not even categorical crimes involving moral turpitude, it defies logic to label them categorical aggravated felonies. Doing so would have the anomalous consequence of attaching the *most* serious penalties to conduct that does not trigger *any* penalty under a related provision that addresses

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[20] Of course, non-citizens who violate broad criminal statutes that reach both temporary and permanent deprivations of property may be deportable if the record of conviction reveals that the "jury was actually required to find all the elements" of a generic theft offense. See *Taylor* v. *United States*, 495 U.S. 575, 602 (1990). See also *Shepard* v. *United States*, 544 U.S. 13, 17 (2005) (reaffirming *Taylor*'s holding that a jury must have "necessarily" found all the elements of the generic offense, as evidenced by the record of conviction, to deport a non-citizen for a conviction under a non-generic statute).

similar conduct. Surely Congress did not intend such a jarring result. As it seems most unlikely that Congress intended the full weight of the draconian aggravated felony penalties to fall on people convicted of joyriding or rummaging through a glove compartment, a section 10851 conviction should not be understood to be a "theft offense" within the meaning of 8 U.S.C. § 1101(a)(43)(G).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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NOVEMBER 2006

873 MOTION FILED
NOV 20 2006

No. 05-1629

IN THE

Supreme Court of the United States

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Petitioner,

v.

LUIS ALEXANDER DUENAS-ALVAREZ,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OUT OF TIME

Amici, by their counsel, respectfully move for leave of the Court to file this brief out of time, on the ground that amici were not aware until after 3 p.m. today, November 20, 2006, that the Court had ordered briefs in this case to be filed by 3 p.m. today, which is earlier in the day than is normally required.

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STATEMENT OF INTEREST[1]

This case addresses whether a violation of a California "joyriding" statute, California Vehicle Code § 10851(a), can be treated categorically as an aggravated-felony "theft offense" under the Immigration and Nationality Act ("INA"). Amici curiae are professors who teach criminal law courses at law schools in the United States, and as such they have a professional interest in ensuring that criminal law principles informing federal and state regulatory schemes like the INA are interpreted in a manner consistent with their historical evolution and their contemporary function in the criminal law. In particular, amici curiae submit this brief to highlight the importance of *mens rea* in defining offenses and the ways in which the intent requirements of the offense at issue here diverge from historical and contemporary understandings of typical theft offenses.

INTRODUCTION

This case raises the question whether the "theft offense[s]" that provide a ground for removing permanent resident aliens from the United States under 8 U.S.C. § 1101(a)(43)(G) should be read to include temporary-deprivation offenses like joyriding which, because of the absence of an intent to permanently deprive the victim of property, historically were outside the scope of paradigmatic theft crimes like larceny and embezzlement. It also raises the issue of whether a "theft offense" under the INA properly includes California's extension of aider-and-abettor liability,

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[1] Pursuant to Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amici, or their counsel, made a monetary contribution to its preparation or submission. Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court.

through the so-called "natural and probable consequences" doctrine, to include offenders who are not shown to have any intent or knowledge with respect to the offense of conviction.

Underlying both issues is the concept of *mens rea* that lies at the core of traditional conceptions of justice in the application of the criminal law. Indeed, this Court has recognized that *mens rea* is so fundamental to notions of criminal responsibility that it is "universal and persistent in mature systems of law." *Staples v. United States*, 511 U.S. 600, 605 (1994) (quoting *Morissette v. United States*, 342 U.S. 246, 250 (1952)).

The statute at issue in this case, California Vehicle Code § 10851(a), permits conviction based on a significantly less culpable level of intent than is generally required for conviction of a theft offense. The watered-down *mens rea* requirement of § 10851(a) diverges from the norm in two significant ways: *First*, as the history, development, and modern status of theft demonstrate, the intent to *permanently* deprive the owner of his or her property is typically an essential element of larceny, embezzlement, and false pretenses, the three offenses that together largely form the modern offense of theft. In contrast, the California statute at issue in this case expressly applies "with or without intent to steal the vehicle," as it covers both theft and joyriding—a tresspass-type offense prohibiting the taking of a vehicle with the intent to *temporarily* deprive a person of its use.

Second, California permits a defendant to be convicted as an aider and abettor even when the defendant has a lower level of criminal intent than the principal and lacks knowledge that the crime is to be committed. This rule, based on the disfavored "natural and probable consequences" doctrine of aiding and abetting liability, makes it possible for defendants to be convicted as aiders and abettors under

§ 10851(a) even without proof of the *mens rea* normally required for theft offenses.

BACKGROUND

Luis Alexander Duenas-Alvarez, a permanent resident alien, was convicted under California Vehicle Code § 10851(a), which proscribes "driv[ing] or tak[ing] a vehicle . . . without the consent of the owner . . . and with intent either to permanently or temporarily deprive the owner . . . of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle." The crime, under California law, could be considered either a felony or a misdemeanor, depending upon the punishment meted out by the sentencing judge. Cal. Penal Code § 17. The maximum punishment for the offense itself is "imprisonment in a county jail for not more than one year or in the state prison" in addition to a fine of up to $5,000. Cal. Veh. Code § 10851(a). Because of a recidivism provision, however, Duenas-Alvarez was sentenced to three years' imprisonment. *See* Cal. Penal Code § 666.5.

The United States Government instituted removal proceedings against Duenas-Alvarez under the INA, alleging that Duenas-Alvarez, *inter alia*, had committed an "aggravated felony." 8 U.S.C. § 1227(a)(2)(A)(iii). Specifically, the Government alleged that Duenas-Alvarez's conviction under California Vehicle Code § 10851(a) qualifies as a "theft offense . . . for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(G). Congress did not define the phrase "theft offense."

The courts of appeals, with reference to this Court's opinion in the analogous case of *Taylor v. United States*, 495 U.S. 575, 599-602 (1990), have applied a two-step analysis to determine whether a state conviction qualifies as an aggravated felony within a particular INA category. *See, e.g.*, *Soliman v. Gonzales*, 419 F.3d 276, 284 (4th Cir. 2005); *Ye*

v. INS, 214 F.3d 1128, 1132-1133 (9th Cir. 2000). Under the first step, the "categorical" approach, if *all* conduct prohibited by the statute of conviction fits within the generic definition of a type of offense enumerated in the INA (such as a "theft offense"), the state conviction categorically qualifies as an aggravated felony. *Taylor*, 495 U.S. at 598-99. However, if the statute of conviction permits conviction for conduct *outside* that generic definition, the court moves to the second step, the "modified categorical" approach. Under this step, the court determines whether—even if the statute of conviction sweeps in conduct outside the generic definition of a particular aggravated felony—the record establishes that the defendant's actual conduct *was* within the generic definition. *Id.* at 599-602.[2]

The immigration judge and Board of Immigration Appeals in this case concluded that Duenas-Alvarez's conviction under California Vehicle Code § 10851(a) categorically qualifies as a "theft offense" under the INA—*i.e.*, that *any* conviction under § 10851(a) necessarily constitutes an aggravated felony in the form of a theft offense under the INA. Pet. App. 3a, 8a-9a. The Court of Appeals for the Ninth Circuit reversed. Pet. App. 2a. The court followed its recent decision in *Penuliar v. Ashcroft*, 395 F.3d 1037 (2005), *amended*, 435 F.3d 961 (9th Cir.), *petition for cert. filed*, 75 U.S.L.W. 3001 (June 22, 2006) (No. 05-1630), in which it held that "[a] conviction under California's vehicle theft statute is broader than the generic definition of a 'theft offense' under 8 U.S.C. § 1101(a)(43)(G)." 395 F.3d at 1044. Accordingly, the court concluded, a conviction under

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[2] Because the second step relates primarily to the specific facts of the individual case, *amici* do not address that issue.

§ 10851(a) is not categorically a "theft offense." *Id.* The court then remanded for application of the "modified categorical" step of the *Taylor* analysis.

ARGUMENT

POINT I

THEFT OFFENSES HAVE TRADITIONALLY REQUIRED PROOF OF AN INTENTION TO PERMANENTLY DEPRIVE THE VICTIM OF PROPERTY

Section 10851(a) expressly applies "with or without intent to steal," and prohibits both vehicle theft, *i.e.*, the intended permanent deprivation of a vehicle, and joyriding, *i.e.*, the intended temporary deprivation of a vehicle. In addressing whether section 10851(a) is categorically a theft offense, this Court should consider that joyriding and theft are historically *distinct* property offenses. As this Court long ago made clear, "stealing"—the core of theft offenses—requires "the intention to keep wrongfully." *Morissette v. United States*, 342 U.S. 246, 271-72 (1952) (internal quotation marks omitted). In contrast, joyriding, which does not require an intention to keep the stolen vehicle, more closely resembles a form of trespass, not theft.

A. Theft Offenses Have Traditionally Required An Intent To Permanently Deprive The Owner Of Property

1. The Traditional Property Offenses From Which Theft Derives—Larceny, Embezzlement, And False Pretenses—Required An Intent To Effect A Permanent Deprivation

The term "theft," in modern criminal statutes, broadly refers to the three principal historical property offenses: larceny, embezzlement, and false pretenses. JEROME HALL, THEFT, LAW AND SOCIETY 34-35 (2d ed. 1952); *see also*

United States v. Bridges, 175 F.3d 1062, 1071 (D.C. Cir. 1999) (District of Columbia has "created a single statute consolidating the various forms of larceny, false pretenses and embezzlement into a single offense called 'theft.'"); *People v. Davis*, 965 P.2d 1165, 1165 (Cal. 1998) ("[T]he formerly distinct offenses of larceny, embezzlement, and obtaining property by false pretenses were consolidated [in California] in 1927 into the single crime of 'theft.'"); *Hawkins v. Agric. Ins. Co.*, 190 A. 858, 861-62 (R.I. 1937) (in construing insurance policy, "the word 'theft' included not only common-law larceny but also each of the crimes which were formerly the separate crimes of embezzlement and obtaining property by false pretenses").

These offenses share the requirement that the defendant have the intent to permanently deprive the property owner of his or her property.[3] *See* BLACK'S LAW DICTIONARY 1477 (6th ed. 1990) ("Theft is any of the following acts done with intent to deprive the owner permanently of the possession, use or benefit of his property: (a) Obtaining or exerting unauthorized control over property; or (b) Obtaining by deception control over property; or (c) Obtaining by threat control over property; or (d) Obtaining control over stolen property knowing the property to have been stolen by another." (citations omitted)). Intent to deprive the owner of his property for only a temporary time was insufficient at common law to support a theft conviction, and largely remains so today.

Larceny, the initial property offense, dates back to the early common law. 4 SIR WILLIAM BLACKSTONE,

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[3] This is sometimes referred to as "the intent to steal." *See Davis*, 965 P.2d at 1167-68.

COMMENTARIES *230 (1769) (examining "theft, or larceny."); SIR EDWARD COKE, THIRD INSTITUTE *107-10 (1644); SIR MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN 503-17 (1683). Since its inception, the intent to permanently deprive the owner of his property was a required element of larceny. In his section on property offenses, Blackstone defined "larceny" as "the felonious taking, and carrying away, of the personal goods of another." 4 WILLIAM BLACKSTONE, COMMENTARIES *230. He then proceeded to "examine the nature of theft, or larceny, as laid down in the foregoing definition." *Id.* Crucially, Blackstone noted that the requirement of an intent to steal—he uses the Latin phrase *animus furandi*—excludes defendants who take property for temporary use, observing that "[t]his requisite indemnifies also mere trespassers, and other petty offenders." *Id.* *232; *see also* George P. Fletcher, *The Metamorphosis of Larceny*, 89 HARV. L. REV. 469, 476 (1976) ("From the earliest description in Bracton to the current cases on larceny, *animus furandi* has always been an unquestioned requirement of larceny.")(footnote omitted). Larceny was considered a serious felony and was punishable by death. Model Penal Code § 223.1 cmt. 2(a), at 128-29 (Official Draft and Revised Comments 1980).

Through the centuries, theft evolved and adapted to changing circumstances, but always retained the requirement of a permanent deprivation. Thus, larceny, the oldest of the theft offenses, originally included three required elements: "(1) a 'trespassory' taking and carrying away of property; (2) from the possession of another; with (3) the intent to permanently deprive the owner of that property." JOHN KAPLAN, ET AL., CRIMINAL LAW 1039 (3d ed. 1996). Over time, the first two of these elements were significantly relaxed and eventually abandoned as elements of theft crimes.

Larceny, for example, adopted the concept of "constructive possession," which relaxed the requirement that the defendant have taken the property directly from the owner's physical presence. *See, e.g.*, *The Carrier's Case*, Y. B. Pasch. 13 Edw. IV, f. 9, pl. 5 (Star Ch. & Exch. Ch. 1473), *reprinted in* 64 Selden Society 30 (1945) (holding that a bailee who had been given physical possession of packaged goods committed larceny when he took items for himself—notwithstanding the fact that the legal owner did not, strictly speaking, have possession of the goods when they were taken); *see also Hildebrand v. People*, 56 N.Y. 394 (1874) (bartender is guilty of larceny where a man, expecting change, gave him a $50 bill to pay for a 10-cent glass of soda water, and the bartender then forcibly ejected the man from premises and kept the money); 3 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 19.1(a) (2d ed. 2003).

The element of trespassory taking also was relaxed to include wrongful acquisitions that were not technically trespassory. In *Rex v. Pear*, 168 Eng. Rep. 208 (Cr. Cas. Rev. 1779), for example, the court concluded larceny could be had by trick. There, a miscreant had hired a mare to travel to one town, while in fact intending to take the animal elsewhere and sell it for his own benefit. The court held this to be larceny, since the miscreant's intent in hiring the horse was "fraudulent, the parting with the property had not changed the nature of the possession." *Id.* at 209. "The judges accepted the fiction that the owner retained possession of the horse until it was sold, on the theory that the thief had custody only for a limited purpose." *Bell v. United States*, 462 U.S. 356, 359 (1983).

In the eighteenth century, Parliament enacted statutes to create the offenses of "embezzlement" and "false pretenses," to address similar types of non-possessory or non-trespassory takings. *See* 30 Geo. 2, c. 24 (1757) (obtaining property by

false pretenses); 39 Geo. 3, c. 85 (1799) (embezzlement by servants and clerks). These offenses, which further relaxed the trespassory and possessive elements of larceny, retained the requirement of an intent to permanently deprive the owner of his property. *See, e.g.*, *Conley v. State*, 64 S.W. 218, 218 (Ark. 1901) ("If the bailee only intends to use the property, and to return it (the specified property) finally to the owner, he is not guilty of embezzlement . . . ."); 3 LAFAVE, *supra* § 19.7(f)(2), at 132 ("As with the analogous theft crimes, larceny and embezzlement, one who tells intentional lies is nevertheless not guilty of false pretenses, because he lacks the intent to defraud, if . . . he intends to return the very property obtained, unconditionally and within a reasonable time, and has a substantial ability to do so."); *State v. Guthrie*, 5 S.W.2d 306, 307 (Ark. 1928) ("[A] wrongful intent to convert another's property, thereby depriving him permanently of it, is an essential ingredient of the crime of embezzlement.") (internal quotation marks omitted); *State v. Lanyon*, 76 A. 1095, 1097 (Conn. 1910) ("To constitute embezzlement under the statute, . . . the party accused must have intended to permanently deprive the persons named in each count of the moneys therein named."); *Commonwealth v. Kelley*, 68 N.E. 346, 347 (Mass. 1903) (quoting 1899 theft statute: "Stealing. – Larceny. – The criminal taking, obtaining, or converting of personal property with intent to defraud or deprive the owner permanently of the use of it; including all forms of larceny, criminal embezzlement, and obtaining by criminal false pretences.").

2. The Evolution Of Theft Offenses Led To The Intent Element Playing An Increasingly Prominent Role In Defining The Offenses

With the evolution of these offenses, the requirement of an intent to effect a permanent deprivation took on an increasingly prominent role. In the early years, because of

the requirements of trespass and physical possession, the defendant's intent in theft was rarely questioned. If, after all, the defendant, who had no right to touch the property, physically removed the property from its owner, intent typically was easy to infer. As the objective manifestations of criminality were relaxed or removed, however, intent became the primary and distinguishing factor of the theft offenses. *See, e.g.*, *People v. Olivo*, 420 N.E.2d 40, 42 (N.Y. 1981) ("As the reach of larceny expanded, the intent element of the crime became of increasing importance, while the requirement of a trespassory taking became less significant. As a result, the bar against convicting a person who had initially obtained lawful possession of property faded."); *see also* Fletcher, *supra*, 89 HARV. L. REV. at 502 ("For modern lawyers, . . . [i]ntent is the primary issue in prosecuting larceny, at least where the requisite harm has been established; the acts are subsidiary and function as one of the several means of proving intent.").

Courts, to avoid spurious inventive tales from defendants regarding their intent to return the property, adopted other objective manifestations to prove a defendant intended to permanently deprive the owner of his property. As was explained in a note to a Queen's Bench case:

> But if [the defendant] took [goods] with a view only to a temporary user, intending however to keep them for a very unreasonable time, or to use them in a reckless, wanton, or injurious manner, and then to leave it to mere chance whether the owner ever recovered them or no, and if he recovered them at all would probably recover them in a damaged or altered condition, such a taking would seem in common sense to be ample evidence of an intent wholly to deprive the owner of his property.

Regina v. Holloway, 169 Eng. Rep. 285, 288 n.2 (1848).

In *State v. Davis*, 38 N.J.L. 176 (1875), therefore, when two companions took a man's horse and carriage from the front of his residence, drove them recklessly and then abandoned them, they were held to have been properly convicted of larceny. "An abandonment to mere chance is such reckless exposure to loss that the guilty party should be held criminally responsible for an intent to lose." *Id.* at 178-79. In *State v. Smith*, 150 S.E.2d 194 (N.C. 1966), too, the defendant was properly convicted of robbery of a rifle, even though he discarded it after taking it. "When, in order to serve a temporary purpose of his own, one takes property (1) with the specific intent wholly and permanently to deprive the owner of it, or (2) under circumstances which render it unlikely that the owner will ever recover his property and which disclose the taker's total indifference to his rights, one takes it with the intent to steal (*animus furandi*)." *Id.* at 200.

The fundamental requirement of an intent to permanently deprive the victim of property, however, was not relaxed. *See, e.g., State v. Ryan*, 12 Nev. 401, 403 (1877) ("[W]e do not know of a case where it has been held that there can be larceny without any intent to deprive the owner of his property."); *see also People v. Kunkin*, 507 P.2d 1392, 1396 (Cal. 1973) ("It has been settled for at least 78 years that theft by larceny requires a specific intent permanently to deprive the rightful owner of his property."); *Smith*, 150 S.E.2d at 198 ("If [one] takes another's property for the taker's immediate and temporary use with no intent permanently to deprive the owner of his property, he is not guilty of larceny."). Indeed, a defendant would be found not guilty of theft even if the property were never returned, so long as the obstacle that frustrated the intent to return was truly unexpected. *See* 3 LAFAVE, *supra* § 19.5(b), at 90.

Appellate courts regularly overturned convictions for larceny or theft on the basis that the defendant lacked the intent to permanently deprive the owner of the property. For

example, in *People v. Brown*, 38 P. 518 (Cal. 1894), the California Supreme Court reversed a conviction for the theft of a bicycle based on an erroneous jury instruction in which "[t]he [trial] court told the jury that larceny may be committed, even though it was only the intent of the party taking the property to deprive the owner of it temporarily." *Id.* at 519. The court rejected that definition of larceny, holding that that "the authorities form an unbroken line to the effect that the felonious intent must be to deprive the owner of the property permanently. . . . [I]t must in all cases be an intent to wholly and permanently deprive the owner thereof." *Id.*

The same reasoning has been applied where the property taken was an automobile. In *Impson v. State*, 58 P.2d 523 (Ariz. 1936), the defendant's conviction was reversed because the trial court failed to instruct the jury that it must find the defendant intended to permanently deprive the owner of the automobile. The court held that "[i]t is well settled that the taking of property temporarily and with the intention of returning it is not larceny." *Id.* at 524. If the defendant intended to return the truck, "he was guilty of a civil wrong against the owner. Temporary conversion or use does not constitute larceny." *Id.* at 525.

Alleged mule thieves, too, were entitled to force the prosecution to prove the element. In *Mitchell v. Territory*, 54 P. 782 (Okla. 1898), the court reversed a conviction of two men for the larceny of three mules. The men testified that they intended to keep the mules for only three days, to harass the mules' owner as part of a dispute over the use of farm land. Over objection, the trial court excluded certain testimony that supported this explanation. The Oklahoma Supreme Court ordered a new trial, holding that larceny requires "the intent to wholly deprive the owner of the property. The intent must be . . . to deprive the owner, not temporarily, but permanently, of the property." *Id.* at 784.

The court stressed, "A taking of personal property with the intent to deprive the owner temporarily of his property, and return the same to him, is not larceny, but is trespass; is not felony, but a misdemeanor." *Id.*; *see also In re Mutchler*, 40 P. 283 (Kan. 1895) (defendant not guilty of larceny where he took someone else's horse and buggy, drove to a town 15 miles away, then wrote a letter to a friend asking him to inform the owner of the property's location).

Even where a court was moved to question the requirement of an intent to effect a permanent deprivation, it ultimately upheld the distinction as a bedrock legal principle. In 1859, the New Jersey Supreme Court, for example, struggled "to assign a satisfactory reason why the fraudulent taking of property from the owner, and an intention on the part of the taker to use the thing taken as his own, and so wrongfully to assert an entire dominion over the thing for a time, should not constitute larceny." *State v. South*, 28 N.J.L. 28, 31 (1859). The court, nonetheless, rejected the idea that the intent to temporarily deprive the owner of his property could constitute larceny, holding "the law is well settled otherwise. It has been uniformly understood and acted upon in this state." *Id.*

The element of the intent to permanently deprive has survived largely unscathed into modern criminal codes. Most states, exemplified by the Model Penal Code, have codified the three original property offenses—larceny, embezzlement, and false pretenses—and other felonious takings with the intent to steal under the general heading of "theft." *See* Model Penal Code § 223.1(1) (describing consolidation of property offenses); 3 LAFAVE, *supra* § 19.8(c), at 145 ("[I]n recent years, the great majority of states (usually as a part of enacting a new criminal code) have abolished these three separate crimes in favor of a single crime, usually called 'theft.'") (collecting statutes); *see also* Theft Act of 1968, c. 60, § 1 (1) (English statute, which serves as the model for

other Commonwealth countries: "A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it . . . ."). In the vast majority of the States, these modern theft statutes have maintained the required element of the intent to permanently deprive, and do not proscribe mere unauthorized use of another's property without such intent.[4]

3. California's General Theft Statute (Which Is Not At Issue In This Case) Exemplifies The Standard Requirement Of An Intent To Effect A Permanent Deprivation

California's own general theft statute provides a good example of the modern status of theft. California broadly proscribes an offense (not at issue here) labeled "theft," which includes the common-law offenses of larceny, false pretenses, and embezzlement. *See* Cal. Penal Code § 484(a).[5]

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[4] Only two states apparently allow an intended temporary deprivation to qualify as larceny. *See* Fla. Stat. § 812.014(1) (theft exists if there is an intent to "either temporarily or permanently" deprive); Ga. Code. Ann. § 16-8-1(1)(A) (defining "deprive" as "[t]o withhold property of another permanently or temporarily"). These outliers are outnumbered by the States at the other end of the spectrum that specify that "nothing short of permanent deprivation will suffice." 3 LAFAVE, *supra* § 19.5, at 88; *see, e.g.*, 720 Ill. Comp. Stat. § 5/15-3; Kan. Stat. Ann. § 21-3110; La. Rev. Stat. Ann. § 14:67; Wis. Stat. Ann. § 943.20(1)(a).

A majority of jurisdictions also require an intent to permanently deprive to support a conviction for embezzlement or false pretenses. *See, e.g.*, Haw. Rev. Stat. §§ 708-800 & -830; 720 Ill. Comp. Stat. § 5/16-1; N.H. Rev. Stat. Ann. §§ 637:2 & :3.

[5] Cal. Penal Code § 484(a) provides:

> Theft defined—Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which

And theft under California law unambiguously requires an intent to permanently deprive the owner of property. *See, e.g.*, *People v. Pillsbury*, 138 P.2d 320 (Cal. Dist. Ct. App. 1943); *People v. Turner*, 73 Cal. Rptr. 263, 265 (Dist. Ct. App. 1968) ("The intent to steal is an intent to deprive the possessor permanently. One who takes another's property for temporary use or concealment, with the intention of returning it, is liable in tort for damages but is not guilty of larceny.") (internal quotation marks omitted); *Kunkin*, 507 P.2d at 1396 ("[T]heft by larceny requires a specific intent permanently to deprive the rightful owner of his property."); *People v. Ortega*, 968 P.2d 48, 51 (Cal. 1998) ("Theft requires . . . the specific intent to permanently deprive a person of property . . . ."); *People v. Avery*, 38 P.3d 1, 1 (Cal. 2002) ("Under California law, theft requires an intent to permanently deprive another of property."). There is no question that under California law, the taking of property with the intent to deprive the owner of its use only temporarily is not considered theft; as explained below, California, like many States, created a separate trespass-derived offense to deal with these intended temporary deprivations of property.

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has been entrusted to him or her, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft.

B. Joyriding, Which Involves Only A Temporary Deprivation, Was Traditionally Considered To Be Outside The Scope Of Theft Offenses

The increased use of the automobile in the early twentieth century created a new social problem with which the law of theft was unable to cope: the rising incidence of intended temporary deprivations involving automobiles, otherwise known as joyriding. Persons, largely teenagers, began to "borrow" automobiles for a quick "spin" and then return them to the owners. *See* Model Penal Code § 223.9 cmt. 1, at 271.

Because of the intent requirement, these joyriders—who were merely engaging in the unauthorized use of automobiles, without seeking to take the automobiles permanently—could not be prosecuted for larceny or theft. For example, in 1970, the Mississippi Supreme Court reversed a conviction for grand larceny, which required the "criminal intent wholly and permanently to deprive the owner of his property." *Slay v. State*, 241 So. 2d 362, 364 (Miss. 1970). In the court's view, the "great weight of the evidence indicates that [the defendants], having wrongfully taken the car by an act of trespass, simply intended to drive it around town on that New Year's Eve night," then in the morning, return it to the place from where they took it. *Id.* Larceny simply did not cover such offenses. *See also Saferite v. State*, 93 P.2d 762 (Okla. Crim. App. 1939) (reversing conviction for larceny of an automobile when the evidence showed that the defendant intended to return the automobile that he had taken).

The common law never adapted to the phenomenon of joyriding. Accordingly, "states . . . progressed to statutes differentiating the taking for temporary use from larceny of an automobile." HALL, *supra*, at 257. Today, "[a] large number of states have singled out the motor vehicle for special treatment, making it a crime (generally called

'joyriding,' a crime somewhat less serious than larceny) to take such a vehicle with intent to use it and return it." 3 LAFAVE, *supra* § 19.5(b), at 92 (collecting statutes in footnote); *see also* Model Penal Code § 223.9 cmt. 1, at 271 ("Nearly all states have legislation penalizing unauthorized taking, use, or operation of motor vehicles. These laws are designed to reach temporary dispossession."). Joyriding, as Professor LaFave points out, is typically a misdemeanor offense, as opposed to theft's more serious felony status. *See* HALL, *supra,* at 257 ("Taking for temporary use is made a misdemeanor.").

Because the crime of joyriding sounds in the unauthorized use of another's property, rather than the permanent deprivation of that property, it has often been classified as a form of trespass. "To take property in the absence of an intention to steal, that is, an intention to convert the same to the use of the taker and permanently to deprive the owner thereof, is not larceny, though under proper conditions it may constitute a trespass." *Ford v. Commonwealth*, 193 S.W. 1026, 1028 (Ky. 1917); *see also State v. Labbitt*, 156 P.2d 163, 165 (Mont. 1945) ("The *animus furandi*, or intent to steal, is an essential element of the crime of larceny. It is this intent which distinguishes larceny from a mere civil trespass.") (internal quotation marks omitted)); *Parr v. Loder*, 97 A.D. 218, 220 (N.Y. App. Div. 1904) ("In *Regina v. Trebilcock* [, 7 Cox Crim. Cas. 408 (1858)] Lord Campbell, C. J., says: 'If at the time of the asportation, his (the offender's) intention is to make a mere temporary use of the chattels taken, so that the dominus should again have the use of them afterwards, that is a trespass, but not a felony.'"); *Home Fire & Marine Ins. Co. v. E.V. McCollum & Co.*, 207 P.2d 1094, 1096 (Okla. 1949) ("A taking of personal property with the intent to deprive the owner temporarily of his property and to return the same to him, is not larceny, but a trespass, is not a felony, but a misdemeanor.").

Courts have carefully policed this boundary between permanent and temporary deprivations—between larceny or theft, on one hand, and joyriding, on the other. "The apparent distinction between a larceny offense and the offense of unlawful taking of a vehicle [*i.e.*, joyriding] is that the former requires an intent to permanently deprive the owner of his vehicle while the intent involved in the latter is a temporary one." *Crow v. Coiner*, 323 F. Supp. 555, 560 (N.D. W. Va. 1971) (W. Va. law) (upholding conviction for larceny where defendant abandoned vehicle seventy miles from place of taking). In *Sandoval v. People*, 490 P.2d 1298, 1299 (Colo. 1971), the court distinguished a joyriding statute, which prohibited taking of property "for the purpose of temporarily depriving the owner," from theft, which required the defendant to "knowingly intend[] to permanently deprive that person" of the property. *See also State v. Nelson*, 386 P.2d 142, 144 (Wash. 1963) (joyriding is "distinguishable from larceny" based on the "intent to permanently deprive"); *McMurphy v. State*, 358 So. 2d 1065, 1066 (Ala. Crim. App. 1978); *State v. Williams*, 588 P.2d 1201, 1202 (Wash. Ct. App. 1978) ("[J]oyriding is not a full-blown larcenous theft"—the difference is the nature of the intended deprivation, "*i.e.*, joyriding merely requires an intent to temporarily deprive"); *State v. Wall*, 157 S.E.2d 363, 365 (N.C. 1967) (joyriding is committed when "any person who drives or otherwise takes . . . a vehicle, not his own, without the consent of the owner thereof, and with the intent to temporarily deprive said owner of his possession of such vehicle, without intent to steal the same."); *Henry v. State*, 328 A.2d 293, 297 (Md. 1974) ("An element of larceny of an automobile is the intent to deprive the owner of his property permanently while as to unauthorized use the intent is to deprive the owner of his custody or use of his property temporarily without intent to steal it.") (internal quotation marks omitted).

In sum, joyriding and other crimes involving temporary deprivations of property are offenses that derive from different sources than traditional theft offenses.[6] By expressly covering the taking of a vehicle "with intent either to permanently *or temporarily* deprive the owner" of possession, "whether with or without intent to steal the vehicle," section 10851(a) goes beyond the traditional scope of theft offenses.

POINT II

CALIFORNIA'S "NATURAL AND PROBABLE CONSEQUENCES" DOCTRINE OF AIDING AND ABETTING LIABILITY SIGNIFICANTLY BROADENS THE SCOPE OF SECTION 10851(A)

The scope of section 10851(a) is also significantly affected by California's adoption of the problematic "natural and probable consequences" doctrine of aiding and abetting

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[6] The Model Penal Code and many States have included joyriding in a chapter or section called "Theft." These statutes, however, are placed in such chapters apparently out of convenience, rather than according to any strict definition. The Model Penal Code, for example, makes clear in its commentary that "Unauthorized Use of Automobiles and Other Vehicles" is not a theft offense. *See* Model Penal Code § 223.9 cmt. 1, at 271 (noting that in addition to theft, "there is still need for a non-felony sanction against the disturbing and dangerous practice of driving off a motor vehicle belonging to another"). Theft under the Code is tied to an intent to deprive, where "deprive" is defined broadly as "to withhold property of another permanently or for so extended a period of time as to appropriate a major portion of its economic value, or with intent to restore only upon payment of reward or other compensation; or (b) to dispose of the property so as to make it unlikely that the owner will recover it." *Id.* § 223.0(1). The Unauthorized Use offense does not include this element. *Id.* § 223.9.

liability, which permits conviction even without proof of intent or knowledge with respect to the crime of conviction.

A. California's Natural And Probable Consequences Doctrine Allows Conviction Of Aiders And Abettors Based On An Intent Standard Akin To Negligence

If there is a common thread to modern approaches to aiding and abetting liability, it is the requirement that the aider and abettor share in the principal's purpose. This shared-purpose requirement was famously expressed by Judge Learned Hand in *United States v. Peoni*, 100 F.2d 401 (2d Cir. 1938). After surveying both the common law and the origins of the Federal aiding and abetting statute, Judge Hand stressed that aiding and abetting liability requires *intent* to aid the commission of the crime, and not the mere *probability* that the crime would result from the defendant's conduct:

> It will be observed that all these definitions have nothing whatever to do with the *probability* that the forbidden result would follow upon the accessory's conduct; and that they all demand that he in some sort associate himself with the venture, that he participate in it as in something that he *wishes* to bring about, that he seek by his action to make it succeed. All the words used—even the most colorless, "abet"—carry an implication of *purposive* attitude towards it.

Id. at 402 (emphasis added). The Second Circuit held that where the defendant had sold counterfeit bills to a purchaser, who in turn had sold the counterfeit money to a third party, the defendant could not be held criminally liable for aiding and abetting the subsequent transaction, even if it was a "natural consequence of his original act." *Id.*; *see also* Grace E. Mueller, *The Mens Rea of Accomplice Liability*, 61 S. CAL. L. REV. 2169, 2176 (1988)

("The purposive attitude standard [adopted in *Peoni*] precludes simple foreseeability as a basis for liability.").

However, some jurisdictions, including California, have incorporated a negligence-like exception to the shared-purpose requirement: the so-called "natural and probable consequences" doctrine, under which an aider and abettor need not be shown to have *any* mental state concerning the commission of the offense of conviction so long as he intends to aid in *some* offense that *foreseeably results* in commission of the offense of conviction. *See People v. Prettyman*, 926 P.2d 1013, 1015 (Cal. 1996).[7] Under that rule, an aider and abettor is liable not only for the crime he intends to aid and abet (the "target crime"), "but also for any other offense (nontarget crime) committed by the confederate as a 'natural and probable consequence' of the crime originally aided and abetted." *Id.* This is true without regard to whether the defendant intended commission of the nontarget crime, and without regard to the normal intent requirements of that crime. Moreover, the standard of foreseeability is a loose one: "[T]o be reasonably foreseeable the consequence need not have been a strong probability; a *possible* consequence which *might* reasonably have been contemplated is enough." *People v. Nguyen*, 21 Cal. App. 4th 518, 535 (1993) (emphasis added).

This doctrine, as it is applied in California, thus results in criminal liability for the nontarget offense being premised on an "objective" standard that is indistinguishable from civil negligence:

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[7] *See also People v. Robinson*, 715 N.W.2d 44, 46 (Mich. 2006); *State v. Linscott*, 520 A.2d 1067, 1070 (Me. 1987).

> The issue does not turn on the defendant's subjective state of mind, but depends upon whether, under all of the circumstances presented, *a reasonable person in the defendant's position would have or should have known* that the charged offense was a *reasonably foreseeable consequence* of the act aided and abetted by the defendant.

People v. Culuko, 78 Cal. App. 4th 307, 327 (2000) (emphasis added; citations, quotation marks, and alterations omitted); *see also Prettyman*, 926 P.2d at 1020 (doctrine imposes liability "for any reasonably foreseeable offense committed as a consequence" of the target offense) (internal quotation marks omitted).

The Commentary to the Model Penal Code makes precisely this point in rejecting the doctrine, observing that "[t]o say that the aider and abettor is liable if the offense . . . is 'reasonably foreseeable' or the 'probable consequence' of another crime is to make him liable for negligence." Model Penal Code § 2.06, at 312 n.42. Likewise, Professor LaFave notes that "[t]he 'natural and probable consequences' rule of accomplice liability .... would permit liability to be predicated upon negligence even when the crime involved requires a different state of mind." 2 LAFAVE, *supra* § 13.3(b), at 362-63; *see also, e.g.*, *United States v. Greer*, 467 F.2d 1064, 1069 (7th Cir. 1972) ("To allow a jury to infer an intent to aid in the commission of one offense from the demonstrated intent to aid in another earlier offense because the later crime is a foreseeable consequence of the earlier one, is to base criminal liability only on a showing of negligence rather than criminal intent.").

This problem, moreover, is not merely theoretical. Under the California natural and probable consequences doctrine there may be circumstances where even a "trivial" target offense makes it "possible for a confederate to become liable for the commission of a very serious crime." *People v. Solis*, 20 Cal. App. 4th 264, 272 (1993). Among other things,

California courts have expressly held that the doctrine "allows an aider and abettor to be convicted of murder, without malice"—even though a murder conviction normally requires proof of malice—*Culuko*, 78 Cal. App. 4th at 322, and that sexual offenses may be "a reasonably foreseeable consequence of a robbery." *Nguyen*, 21 Cal. App. 4th at 533.

In short, the natural and probable consequences doctrine as applied in California significantly lowers the mental state necessary to convict an aider and abettor—and thereby significantly expands the scope of criminal liability.

B. The Doctrine Has Been Severely And Persuasively Criticized

Not surprisingly, the natural and probable consequences doctrine has been the subject of severe criticism for its departure from generally-applicable principles of criminal intent and its inversion of the intent requirements for principal and aiding and abetting liability. For example, the Commentary to the Model Penal Code highlights the unfairness and anomaly of a doctrine that permits conviction of an aider and abettor based on a lower standard of intent than is required for conviction of a principal, observing:

> This is both incongruous and unjust; if anything, the culpability level for the accomplice should be higher than that of the principal actor, because there is generally more ambiguity in the overt conduct engaged in by the accomplice, and thus a higher risk of convicting the innocent.

Model Penal Code § 2.06, at 312 n.42.

Professor Kadish criticizes the doctrine on similar grounds, as well as on the basis of the doctrine's departure from traditional principles requiring criminal liability to be premised on criminal intent:

> It is impossible to make [the rationale underlying the natural and probable consequences doctrine] consistent with the usual requirement of intentionality. Indeed, it is inconsistent as well with the related requirement that the accomplice act with the *mens rea* required of the principal's crime. For it would seem to allow holding the accomplice for a crime of knowledge or purpose committed by the principal as long as he should have anticipated the principal's actions.

Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 351-52 (1985).

In addition to these sources of unfairness, the doctrine has the undesirable effect of resuscitating common-law distinctions that the modern aiding and abetting statutes were designed to abolish. *See, e.g., Standefer v. United States*, 447 U.S. 10, 19 (1980) (federal aiding and abetting statute designed to "'abolish[] the distinction between principals and accessories'") (quoting *Hammer v. United States*, 271 U.S. 620, 628 (1926)). As one commentator has noted:

> If the mental state for the principal is allowed to differ . . . from that for the aider and abettor or the causer, then the jury would have to first determine in each instance whether the defendant is an aider and abettor . . . or a principal, in order to know which mental state to apply. Requiring the jury to make those distinctions effectively resurrects the pre-1909 state of the law, and stands in direct contradistinction to the "no distinction" rule.

Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 FORDHAM L. REV. 1341, 1365 (2002).

For these reasons, Professor LaFave is clearly correct in observing that the natural and probable consequences doctrine is not the "better view," 2 LAFAVE, *supra* § 13.3(a), at 356; that it "is inconsistent with more fundamental principles of our system of criminal law," *id.* § 13.3(b), at 362; and that its "general application . . . is unwarranted," *id.* *See also* Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91, 98 n.35 (1985-1986) (doctrine is "one of the most troubling and frequently criticized aspects of accomplice liability"); Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 638 (1984) (observing that, under "the natural and probable consequence rule, a defendant may be held liable for an offense even though he does not satisfy the culpability requirements of the offense").

Notably, several States that once applied the doctrine have recently disavowed and overruled those decisions that adopted it. In *Sharma v. State*, 56 P.3d 868 (Nev. 2002), for example, the Supreme Court of Nevada reversed the conviction of an individual who had been convicted of attempted murder because the jury received a natural and probable consequences instruction. *Id.* at 872-73. In reaching this result, the court noted that the "natural and probable consequence" doctrine

> has been harshly criticized by most commentators as both incongruous and unjust because it imposes accomplice liability solely upon proof of foreseeability or negligence when typically a higher degree of *mens rea* is required of the principal. It permits criminal liability to be predicated upon negligence even when the crime involved requires a different state of mind. Having re-evaluated the wisdom of this doctrine, we have concluded that its general application in Nevada

> to specific intent crimes is unsound precisely for that reason: it permits conviction without proof that the accused possessed the state of mind required by the statutory definition of the crime.

Id. at 871-72 (citations, quotation marks, footnotes and alterations omitted); *see also State v. Carrasco*, 946 P.2d 1075, 1079 (N.M. 1997) (disavowing the natural and probable consequences doctrine and, instead, requiring that "an accessory must share the criminal intent of the principal").

In short, the natural and probable consequences doctrine has been widely and justifiably criticized, and this Court should give serious consideration to those criticisms—and to the expansion of criminal liability effected by the doctrine—in analyzing whether a statute that incorporates the natural and probable consequences doctrine, as California Vehicle Code § 10851(a) necessarily does, comports with the generic understanding of what constitutes a "theft offense."

CONCLUSION

Offenses like California Vehicle Code § 10851(a), which do not require the intent to permanently deprive the victim of property, historically were outside the scope of paradigmatic theft crimes like larceny and embezzlement. The proof of intent required by § 10851(a) is also lower than the norm in that the statute incorporates California's extension of aiding and abetting liability, through the natural and probable consequences doctrine, to include offenders who do not share in the criminal intent of the principal.

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November 20, 2006